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POLITICAL IDEOLOGY, PROPAGANDA, AND PUBLIC LAW OF THE ROMANS: IUS IMAGINUM AND CONSECRATIO IMPERATORUM*

I

GREECE had been conquered, and in the year 166 B.C. one thousand Greek hostages were taken to Rome, among them a highly cultured man who was considered dangerous by the Roman Military Government. He stayed in Rome for sixteen years, living in her political and spiritual center, in the house of the younger Scipio, the first man of the age. There the Greek hostage developed into one of the greatest historians of antiquity. Polybius was under the impact of the fall of his native country which had, politically, ceased to exist, although it had inspired the culture of humanity, then as well as today. All the more he was impressed with the successes of Rome, which had begun as a small country town and was now about to conquer the entire world known to antiquity, the *orbis terrarum*. Rome was creating a universal organization of peace—"one world"—for the first, and, up to the present day, for the last time. Polybius was the first to raise a question which has been debated for two thousand years: which were the causes of Rome's greatness? Trained in the political philosophy of Plato and Aristotle, he saw the principal cause in the constitution of the Roman Republic and tried to discover its essence.

* Address of the *Magister* for the academic year 1948/49 of the Riccobono Seminar of Roman Law in America, delivered in the final conference on May 19, 1949. Some notes have been added.

Polybius was no mere theoretician. He had held high political office in Greece, and he was a practical statesman. It is therefore strange to note that this man considered the political ideology of the Roman constitution significantly expressed by an institution which strikes us as a quaint, almost an absurd detail: the *ius imaginum*. Today it is hardly mentioned at all in textbooks of Roman Law and Roman legal history; but Polybius in his great history devotes to it a remarkably long and detailed dissertation. We may remember that, in Goethe's words, full of wisdom, "to understand the particle is to grasp the universe." [1]

The *ius imaginum* was the privilege of the descendants of the great families to show in their funeral processions the *imagines maiorum*, that is, the wax effigies and masks of their deceased ancestors who had held high office—the curulic offices—, above all, the consulate.[2]

The custom of the masks of the dead harks back to the oldest times of mankind. Such masks have been found in many different places of the Mediterranean world, for instance, in the royal tombs of Mycene, of about 1500 B.C.[3] In

[1] "Willst Du Dich am Ganzen erquicken, / Musst Du das Ganze im Kleinsten erblicken" (*Sprüche in Reimen*).

[2] Cf. Mommsen, *Römisches Staatsrecht*, I (3rd ed.), 442f.; Marquardt, *Privatleben der Römer* (2nd ed.), I, 241ff.; M. Gelzer, *Die Nobilität der Römischen Republik* (1912), 21; F. Münzer, *Römische Adelsparteien und Adelsfamilien* (1920), 409ff.; L. Friedlaender-Wissowa, *Sittengeschichte Roms* (9th ed.), II, 357; K. Schneider, "Imagines maiorum," *Realencyclopädie der class. Altertumswissenschaft* [=RE], IX, 1098ff.; A. N. Zadoks-Jitta, *Ancestral Portraiture in Rome* (Diss. Amsterdam, 1932), 22ff., 97ff. (the author believes that the *ius imaginum* gave only the right to display one's own portraits; this interpretation has been refuted by Henry T. Rowell, "The Forum and Funeral Imagines of Augustus," *Memoirs of the American Academy in Rome*, XVII [1940], 132ff.); Erich Bethe, *Ahnenbild und Familiengeschichte bei Römern und Griechen* (München, 1935), 1ff.; F. Bömer, *Ahnenkult im alten Rom* (Diss., Berlin, 1939 [inaccessible]).

[3] O. Benndorf, "Antike Gesichtshelme und Sepulcralmasken," *Denkschriften der Akademie der Wissenschaften, Wien, Phil.-hist. Klasse*, XXVIII (1878), 370ff.; Bethe, *op. cit.*, 7ff., 105 n. 4; E. F. Bruck, *Totenteil und Seelgerät im Griechischen Recht* (München, 1926), 8 n. 5, 37.

Rome the conservative aristocracy preserved the custom, even as in our days age-old customs can be found in the funeral ceremonies of the last princely houses of Europe. The Roman aristocracy, however, considered and kept the old custom as their distinctive privilege, *ius,* and this was not disputed by the Roman people. Cicero calls it the *ius imaginis.*[4]

[4] Cicero (*Verr.,* II, 5, 36,) speaks of the *ius imaginis ad memoriam posteritatemque prodendae.* He lists it among the rights connected with his impending office as curulic aedile; he means to say that his descendants will have the right to show his *imago* in the funeral processions of their *gens* (cf. H. T. Rowell, *op. cit.,* 135). Of course, the *ius imaginis* was not based on a *lex* (in this respect Mommsen has been misunderstood by some recent writers); modern lawyers would rather call it a customary law. However, the Roman jurists of republican and even of classical times—interested, like their Anglo-Saxon colleagues, in individual cases, not in theories—did not develop a theory of customary law. They took old rules and institutions for granted but did not trace a clear-cut borderline between custom without legal force and customary law (cf. M. Kaser, "Mos maiorum und Gewohnheitsrecht," *Savigny-Zeitschrift, Rom. Abt.* [=ZRG], LIX [1939], 57; even more pointedly, F. Schulz, *History of Roman Legal Science* [Oxford, 1946], 24f. and *passim*). However, there was a wealth of old and recognized rules and institutions—especially during the period of the Republic—which were not based on a *lex,* e.g. *patria potestas, manus, tutela, mancipatio,* the *imperium* of the officials, and many others. They were considered legal institutions. Ernst Levy once remarked pointedly (ZRG, LIII, 643): "Die Römer hatten sogar fast nur Gewohnheitsrecht. Auch die auffallend wenigen *leges* hatten ihre Verbindlichkeit selten durch aufhebende Gesetze, umso häufiger aber faktisch durch *desuetudo* aufgehoben." Does the *ius imaginum* belong into this context? Our sources do not suffice for giving a definite answer about its legal character. However, this is less important from the point of view of the Romans than from that of modern theory. This conservative people, and particularly its ruling class, clung to the *mos maiorum* with greatest tenacity. Tradition was a tremendous force in Roman life, particularly among the ruling class (cf. for instance W. Kroll, *Kultur der Ciceronischen Zeit,* I [1933], ch. 2; Schulz, *Prinzipien des Römischen Rechts* [1934], 57f.; also R. Syme, *The Roman Revolution* [Oxford, 1939], 315f.). To quote a typical example for the Roman way of thinking, we recall the words of the *pontifex maximus* Cotta with regard to the *sacra,* an institution closely connected with the *ius imaginum* (cf. below, at n. 14): "credo ut . . . sacra ceremonias religionesque defenderem. Ego vero eas defendam semper semperque defendi, nec me ex ea opinione, quam a maioribus accepi . . . ullius umquam oratio aut docti aut indocti movebit . . . Mihi enim unum sat erat, ita nobis maiores mores tradidisse" (Cicero, *De natura deor.,* III, 2, 1 and 9).

It did not mean a deviation from the *ius imaginum* that it was left to the

Polybius gives an impressive picture of what he had evidently observed many times.[5] A former consul had died, say, a member of the gens of the Cornelii, and the funeral procession moved through the streets of Rome to the Forum. Polybius beheld with astonishment the carriages preceding the hearse. On each carriage, a person embodying a dead ancestor of the deceased was seated, everyone a Cornelius who had once himself held the highest offices: consuls, censors, praetors, dictators. (The dictator of the Roman Republic, as is well known, was not a totalitarian usurper; he was appointed by the Senate for a short period during emergencies.)

The great ancestors partook, as it were, personally in the funeral of their descendant. Preferably they were represented by members of his own family, bearing a likeness to the man portrayed. Their faces were covered by the *imagines,* painted masks which had long ago been taken from the dead, so that the dead appeared to be brought back to life. They wore their official robes, the white *toga praetexta* with the purple stripe and, if they had attained the highest honor open to a Roman, the triumph as Commander-in-Chief, the purple robe of the *triumphator.* Lictors marched in front of each of the dead officials, their numbers in accordance with the official rank he had held in life: two lictors for a praetor, twelve for a consul, twenty-four for a dictator, all shouldering the *fasces,* the impressive symbol of Roman official authority. The significance of this symbol is evident when we consider that states with the most diverse ideologies time and again have adopted the

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descendants to omit less popular ancestors in the *pompa,* even though they had held curulic offices (Cicero, *Ad. fam.,* IX, 21). Cf. Rowell, *op. cit.,* 136: "The fact of having held high offices did not automatically assure the deceased of the honor." The *ius imaginum* was not a claim of the deceased ancestors to be honored in the funeral procession; it rather was a right—and not a duty—of the descendants to have the *imagines* of their ancestors carried in the procession. They acted, therefore, within their right in dropping unpopular ancestors, an interpretation which agrees with the view (cf. below, pp. 8-10) that the *ius imaginum* was used for political propaganda.

[5] Polybius, VI, 53. Cf. Plinius, *Naturalis historia,* XXXV, 6ff.

fasces as a symbol of public authority—not only fascist states in our day, but also the French Republic in the period of enlightenment, or the United States, where the *fasces* can be seen on every dime.

The impression of the procession of the *imagines* on the Roman people, crowded in the streets, was tremendous. The monotonous every-day existence of the man in the street was interrupted. His delight in pageantry and the magic horror of the resurrected dead mingled with deep respect for the great men passing by. Everyone knew what they had done for Rome in peace and war. The procession went to the *rostra* of the Forum. And while a *laudatio* was delivered there, addressed to the dead man, his ancestors were solemnly sitting around the bier—on curulic chairs, as it was their due—hearing and examining, so to speak, what their descendant had achieved for the *res publica;* and around them, as Polybius stresses again, stood the people of Rome, filled with common pride for the men who had made Rome great.

Why did the *ius imaginum* appear so important to Polybius? Indeed, this curious right illustrates an essential feature of the unwritten constitution of the Roman Republic: the contrast between law and reality. At first sight the constitution of the Roman Republic appears to be democratic. Legally, sovereignty rested in the entire people of Rome. It was exercised directly in the people's assemblies, particularly in the *comitia centuriata,* where all citizens had a right to be present. The idea of government by representation was foreign to Rome as well as to other bodies politic in antiquity. The *comitia* elected the highest officials, consuls and praetors, and voted the laws. The officials, it is true, held a far-reaching executive power, the *imperium.* But they were also restricted in as much as they were elected for only one year. After one year the entire people again went to the polls. But the reality of the political power in the Roman Republic did not correspond to the legal situation. Actually it was always the

nobility which governed, at first the patricians alone. Even after the struggle of the orders in the fourth century B.C. had ended and plebeians were admitted to the highest offices, a new aristocracy soon arose, the *nobilitas* which became even more powerful. To this *nobilitas* belonged, apart from the remnants of the patriciate, only such families as had a consul among their ancestors.[6] It was an aristocracy of office. Despite the democratic form of popular election, the leading offices were filled almost exclusively by members of the *nobilitas*. And the officials, upon expiration of their term of office, entered the Senate as lifetime members.

From the legal point of view the Senate possessed neither executive nor legislative power. As a permanent council of the highest officials it could make only recommendations, *senatus consulta*. Its resolutions lacked the power of law (*leges*). But these resolutions enjoyed the highest repute; they had *auctoritas*, this typically Roman phenomenon. It meant recognition of the political wisdom and experiences of a centuries-old tradition as it was embodied in the Senate. In this voluntary submission to the Senate lies the essential difference from the *auctoritas* of modern authoritarian states, the dictatorships behind which stands only the concentration camp.

The political power of the Senate surpassed that of the people's assemblies, which were summoned only on relatively rare occasions. It surpassed the influence of the ever-changing officials. It surpassed the power of the *tribuni plebis*. In reality, though not legally, the highest authority in the Roman Republic rested with the Senate. It is more and more recognized that the apparently democratic constitution of the

[6] M. Gelzer, *op. cit.* (above n. 2), 42f.; id., "Die römische Gesellschaft zur Zeit Ciceros," *Neue Jahrbücher für das klassische Altertum*, XXIII (1920), 3ff.; essentially in agreement, Adam Afzelius, "Zur Definition der Römischen Nobilität zur Zeit Cicero's," *Classica et Mediaevalia*, I (Leipzig, Paris etc, 1938), 40ff., 46ff., 88ff.; R. Syme, *The Roman Revolution* (Oxford, 1939), 10ff., 152.

Roman Republic was in reality an oligarchy of the *nobilitas*.[7] Polybius, an aristocrat by birth and conviction, sided with this nobility.

In our times, when social and political distinctions are vanishing all over the world, it appears very strange that the highest elective offices, and thereby indirectly the Senate, should have been filled almost exclusively by members of a noble class. How was this possible?

Legally, every Roman citizen was eligible to all offices, up to the very highest ones. It is true that for a long time the method of voting in the *comitia centuriata* secured a small majority to the well-to-do, a fact which, incidentally, was camouflaged in a rather refined way.[8] But the well-to-do majority of the *comitia* consisted only in part of the nobility, which, numerically, formed a negligible minority of the Roman people. Nevertheless, again and again, the same old names of the *nobilitas* occur in the lists of the consuls and other high officials. For a period of three hundred years, beginning with 366 B.C., there were among six hundred consuls only fifteen "new men," *homines novi*.[9] And curiously enough, when in the last century of the Republic the party of the *populares* mobilized the masses of Rome against the government of the noble Senate, members of the nobility were again among their greatest leaders: the two Gracchi and Julius Caesar.

Certainly, the nobility had achieved great things. Above all, it had created the Empire. Commerce flourished and enormous riches flowed to Rome from the East. Since 168 B.C. Roman citizens had paid no taxes. *Panis* and *circenses* were lavishly dispensed among the masses in Rome. But the

[7] Gelzer, *Römische Gesellschaft zur Zeit Cicero's*, 3ff.; Joseph Vogt, *Römische Geschichte*, I (Freiburg i.B., 1932), 38ff.; and id. in *Gnomon* (1928), 352; Syme, *op. cit.*, 10ff., 152. Cf. W. Ensslin, "Die Demokratie und Rom," *Philologus*, LXXXII (1927), 313ff.

[8] Arthur Rosenberg, *Untersuchungen zur römischen Zenturienverfassung* (1911), 16f., 19.

[9] Gelzer, *Römische Gesellschaft*, 9.

nobility also committed grave errors, particularly in its selfish and shortsighted agrarian policy. The extinction of the Roman peasantry, the backbone of the Roman people and army, was the sad result. A great part of the proletarian masses consisted of dispossessed peasants and their descendants. Nevertheless, the people persisted in electing *nobiles* to the highest offices and thereby indirectly to the Senate.

Among the sociological and political factors favoring the nobility we should not forget the *ius imaginum*. In those times, when our modern means of molding public opinion were unknown, the procession of the *imagines* was magnificent propaganda for the ruling class. Time and again, the men of the great families were returned to life in their effigies and their contribution toward the grandeur of Rome was visually placed before the Roman people.

Livy states that the mass of the people wanted to see at the helm of the state those men whose fathers and grandfathers had already been in view in leading positions.[10] Even under the utterly different social and constitutional circumstances of our day, we meet with a similar phenomenon. The magic power of a famous father's name has been recently demonstrated in more than one election.[11] Livy could not better characterize an eminent member of the *gens* of the Claudii than as a man *honoratissimae imaginis,* that is, a man whose effigy gives evidence of most honorable offices for the Republic to coming generations.[12] Cicero, himself a *homo*

[10] Livy, IV, 44, 25.

[11] Examples need not be cited. We read in the *Christian Science Monitor* (Boston, February 17, 1949) that a successful candidate in Indiana attributed his victory to "the memory in men's minds of the way my father conducted his private and public life."

[12] Livy, III, 58, 2. Valerius Maximus (III, 8, 7) significantly calls a man who was noble not by his birth but by his mind, "sine ullis imaginibus nobilem animum."—Replicas of the *imagines* were displayed in shrines in the *atrium,* the center of the Roman house, visible to all visitors. The learned Atticus deemed these *imagines* so important that he composed texts for the tablets attached to them. They contained the names of the individual ancestors, their high offices and performances for the state (Cornelius Nepos, *Atticus,* XVIII, 5).

novus, commented full of anger upon the noble Piso that he owed his political career to his "famous *imagines* blackened by smoke." [13]

Polybius even believed that the Romans had invented the *ius imaginum,* as well as the ancestor-worship (*sacra privata*) connected with it,[14] in order to strengthen the political influence of the noble families and to hoodwink the common people.[15] In reality, the cult of the *imagines* and of the *sacra* harks back to age-old religious beliefs, but the rationalist Polybius, who had learned his statecraft in Greece, observed the efficient working of the *ius imaginum* in Roman politics. The shrewd politicians of the nobility, whose lifeblood was electioneering from childhood, knew how to combine the old custom of the *imagines* with a lively propaganda to further their own political careers. And, as sometimes happens in political propaganda, they did not always abide by the exact truth. They invented fictitious ancestors or ascribed to them high offices which they had not held in reality, as Livy, among other writers, informs us.[16] When the procession of the

[13] Cicero, *In Pisonem,* 1. Cf. Bethe, *op. cit.* (above n. 2), 106 n. 7. Cicero's anger was justified. The *nobilitas* eagerly made use of the services of this faithful supporter, but socially Cicero was not accepted (cf. *Epist. ad Atticum,* I, 18, 1). In the old patrician aristocracy of Geneva which showed many a parallel to the Roman *nobilitas*—only those belonged who had a "syndic" among their ancestors—one would have said of Cicero: "Il n'est pas reçu par les bonnes familles."

[14] Cf. on this connection E. F. Bruck, "Foundations for the Deceased in Roman Law," *Studi Ferrini,* IV (Milan, 1949), ch. III, 3.—The *sacra privata,* the exclusive cult of the family, aided the cohesion and thereby buttressed the political influence of the families of the *nobilitas.* Cf. e.g. Cicero, *De officiis,* I, 17, 75: "Magnum est eadem habere monumenta maiorum, iisdem uti sacris, sepulcra habere communia."

[15] Polybius, VI, 56, 9: Ἐμοί γε μὴν δοκοῦσι τοῦ πλήθους χάριν τοῦτο πεποιηκέναι (cf. VI, 52, 11).

[16] Livy, VIII, 40, 4.—On falsifications of family trees and of inscriptions beneath the *imagines* in the family chapels cf. Mommsen, *Römische Forschungen,* II (1879), 228; Friedlaender, *Sittengeschichte,* I, 102, 174; Bethe, *op. cit.,* 82ff., 119f.; Afzelius, *op. cit.* (above n. 7), 49. On the other hand, unpopular ancestors were dropped (cf. above n. 4 *in fine*).

imagines solemnly moved through the streets, nobody was able to ascertain whether the line of ancestors had not been prolonged or embellished.[17]

Even a man like Caesar's murderer, Junius Brutus, who for many centuries appealed as an ideal to the oppressed, had a family tree fabricated by his friend Atticus.[18] Brutus' glory was enhanced by a great ancestor, the mythical Brutus who was supposed to have killed the last Roman king. Probably, the ancestor of Brutus had already been invented, according to the pattern of the Greek tyrannicides. At any rate, the younger Brutus was merely a namesake of his alleged ancestor. Falsifications of this kind had started as early as at the end of the 4th century B.C. They may have been caused partly by vanity, but surely not least of all by the political importance of a long procession of *imagines* for the living politicians.

In contrast to the Roman Republic, where nobility ruled, Greek democracies such as Athens early saw through the propagandistic value of pompous funerals for the political power of the nobility, and hence forbade them. Such prohibitions against the so-called funeral luxury of the powerful were an essential element of the democratic legislations promulgated in many Greek states in the seventh and sixth centuries B.C. after the rule of the noble families had been overthrown.[19]

With the fall of the Roman Republic the Roman nobility lost its political influence. Nevertheless, even under the Principate, it kept the ancestral effigies in funeral processions, sometimes to demonstrate a *fronde* rendered powerless. Tacitus, himself a member of the opposition, concludes the first book of his Annals by describing the elaborate *imagines* in the funeral procession of Junia Tertullia, sister of Junius Brutus

[17] Bethe, *op. cit.*, 84.

[18] Münzer, in *Hermes*, XL (1905), 94; Friedlaender, *op. cit.*, I, 120; Bethe, *op. cit.*, 85, 119.

[19] Cf. Bruck, *op. cit.* (above n. 3), 96ff., 150ff., 177, 233.

and widow of Cassius.[20] Impressively, Tacitus depicts how the *imagines* of twenty of the most famous families passed by, great names like the Manlii and the Quinctii; "but," he adds, "Caesar's murderers, Cassius and Brutus, stood out because their effigies could not be seen." For Tacitus, the historian, the depicting of the *imagines* forms a climax. "The great artist could not find a more impressive ending for the first part of his presentation than the account of how this woman, and with her, so to speak, the old Republic, was carried to the grave." [21]

This was no longer the practice of the old *ius imaginum* of the Republic, the essence of which had consisted in carrying the *imagines* of the *gens* in the funeral procession. Now, the effigies of deceased relatives of different *gentes,* even of the ancestors of the wives, were added. *Imagines* of any Roman whatever—Romulus at the head—were exhibited at the funeral processions of the emperors and members of the imperial house, especially so at the processions for later emperors, who had risen from the ranks and whose ancestors were unknown.[22] *Imagines* remained a part of the *pompe funèbre,* but the old "right to the *imagines*" had died of *desuetudo.* Falling into disuse was the most common cause of death of rules of Roman law—of statutory as well as of customary law, and of the *mos maiorum.*[23]

II

With the Roman Republic the power of the nobility and the political influence of their dead had broken down. But, curiously enough, in the political ideology of the Principate the dead reappeared at once. *Les morts sont morts: vivent les morts!* This time they were even more powerful than the

[20] Tacitus, *Annales,* III, 76.

[21] Münzer, *op. cit.* (above n. 2), 372.

[22] Bethe, *op. cit.,* 5, 8; Rowell, *op. cit.* (above n. 2), 143.

[23] Cf. above n. 4.

dead *nobiles* had ever been. They were the dead emperors, the *Divi Imperatores:* they were elevated to the rank of gods.[24]

From the viewpoint of the history of religion, this marks a considerable difference. The dead *nobiles* had remained human beings after their death: they were not worshipped as gods. With truly Roman consistency it was ruled that the *imagines* of dead emperors—at first the *imago* of *Divus* Julius Caesar—could not appear in the ancestral processions during burials of their own families.[25] They had become gods and had been elevated to heaven. Instead, the *imagines* of the

[24] Elias Bickermann, "Die römische Kaiserapotheose," *Archiv für Religionswissenschaft,* XXVII (1929), 1ff., deals *ex professo* with the *consecratio,* predominantly from the point of view of the history of religion. From the abundant literature treating pertinent questions from different points of view the following may be cited: E. Beurlier, *Le culte impérial, son histoire et son organisation depuis Auguste jusqu'à Justinien* (Paris, 1891); E. Kornemann, "Zur Geschichte des antiken Herrscherkults," *Klio,* I (1902), 51ff.; Lily Ross Taylor, *The Divinity of the Roman Emperor* (Middletown, Connecticut, 1931; cf. the reviews by A. D. Nock, *Gnomon,* VIII [1932], 513ff.; von Premerstein, *Philologische Wochenschrift,* LIII [1933], 1114ff.; U. Kahrstedt, *Göttingische Gelehrte Anzeigen,* [1933], 200ff.); A. D. Nock, "Religious Developments from the Close of the Republic to the Reign of Nero," *Cambridge Ancient History* [=CAH], X (1934), 465-511, and the same authors' "Seviri and Augustales," *Mélanges Bidez* (Bruxelles, 1934), 627-638. Moreover W. S. Ferguson, "Legalized Absolutism en Route from Greece to Rome," *American Historical Review,* XVIII (1913), 29ff.; G. Herzog-Hauser, "Kaiserkult," RE, *Suppl.* B IV (1924), 806ff.; Kenneth Scott, "Notes on Augustus' Religious Policy," *Archiv für Religionswissenschaft,* XXXVIII (1933), 121ff.; Wilhelm Weber, *Princeps,* I (Stuttgart, 1936), 86-101; F. Vittinghoff, *Der Staatsfeind in der römischen Kaiserzeit* (1936), 77ff., 106ff.; H. T. Rowell, *op. cit.* (above n. 2), 142f.; Mason Hammond, "Hellenistic Influences on the Structure of the Augustan Principate," *Memoirs of the American Academy in Rome,* XVII (1940), 4ff.; W. Ensslin, *Gottkaiser und Kaiser von Gottesgnaden* (Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil. Hist. Kl., 1943, Heft 6); A. Alföldi, "Über Ausgestaltung des monarchischen Zeremoniells am Römischen Kaiserhof," *Mitteilungen des Deutschen Archaeologischen Instituts, Röm. Abt.* XLIX (1934), 1ff., and "Insignien und Tracht der römischen Kaiser," *ibid.* (1935), 1ff.

[25] Dio Cassius, XLVII, 19, 2; cf. LVI, 34, 2; 46, 4. Cf. Wissowa, *Religion und Kultus der Römer* (2nd ed., 1912), 343 n. 5.

dead emperors appeared among the images of the gods which were driven on a car (*tensa*) at the *ludi circenses*.[26]

Politically and from the standpoint of the public law, however, the *Divi Imperatores* have this in common with the dead *nobiles* that, then as now, the deceased were put into the service of the political ideology and its propaganda. From this point of view we want to examine the cult of the dead emperors. It formed an essential element of the new order of the Principate as founded by Augustus. The point of departure was Caesar's deification, the first in the long line of the *Divi Imperatores*. It was the work of Augustus and arose from political motives. Augustus used the *Divus Caesar* in his struggle to build up his own political position.

Caesar had been murdered. He had striven to create an absolute monarchy after the Hellenistic pattern, based on worship of himself as a god, not only after his death, but even during his lifetime. It was the religious-political recipe according to which, with manifold variants, the Orient had been ruled for many centuries.[27] When Alexander the Great founded his Greco-Oriental Empire, godlike worship of the ruler became the hub of his political ideology, supposedly in order to hold together the various peoples under his rule. Alexander, it is true, did not create a uniform state-cult for his empire; the cult of the king rested upon various legal bases. In Egpyt, for instance, he entered upon the inheritance of the Pharaos and ruled the native population as god-

[26] Suetonius, *Claudius*, 11; Wissowa, *loc. cit.*, n. 6; Friedlaender, in Marquardt, *Römische Staatsverwaltung*, III (1878), 510. Although the dead emperors were worshipped as gods, there remained a difference between the original gods and the deified rulers, dead or living, so far as the religious feeling was concerned. One did not say prayers to the rulers in the same way as to the original gods, "in the expectation of blessing to be mediated in a supernatural way," nor did one give thanks to them "in recognition of supposed deliverance in some invisible manner from sickness or peril" (Nock, CAH, X, [1934], 481f., 489, and in *Gnomon*, VIII [1932], 517). The divinity of the rulers was in the first line a political creation (see the text).

[27] The Hellenistic origin of ruler worship in Rome is stressed by M. Hammond, *op. cit.* (above n. 24), 4ff.

king, as "Son of Ammon," the great god.[28] On the other hand, the Greek city states degenerated into puppet states. They elevated Alexander as their city god, ostensibly by voluntary city laws, "in gratitude," as it was sometimes pronounced in the decrees, but in reality under pressure.[29] With this, the cult of the ruler started to invade the Occident.

After Alexander's death, the Diadochs continued his religious policy, particularly in Egypt and the Orient, though there were again variants in the concepts and cults. As for Greece, she had become the battleground for the rival Diadoch kings—at times a cold, at times a hot war. In order to win over the Greeks, the various rivals from time to time proclaimed the liberty of Greece. These proclamations changed little or nothing in the political dependence of the Greek cities; but the Greek satellite cities frequently deemed it wise to elevate these dubious liberators and benefactors to be their "Saviour-Gods." For instance, Athens appointed Antigonos and his son Demetrios to this rank in the year 307 B.C.[30] Cities striving to maintain a neutral position sometimes deified several rival kings at the same time, as did for instance Athens in the case of Ptolemy and Attalos.[31] They were assigned to different districts (*phylae*) of the city in order to avoid collisions among the two gods. This was neutrality in the Hellenistic style. It proves the political character of these deifications.

When the Romans by and by conquered the Orient they faced this strange world, governed by god-kings. The statesmen and generals of the powerful Roman Republic were cele-

[28] Kornemann, *Klio,* I, 59ff.; Wilcken, *Alexander der Grosse* (Leipzig, 1931), 104ff., 115ff.; Nock, *Gnomon,* VIII (1932), 515.

[29] Ferguson, *op. cit.* (above n. 24), 31f.; Herzog-Hauser, *op. cit.,* 808; Taylor, *op. cit.,* 21f.

[30] Kornemann, *op. cit.,* 66; Taylor, *op. cit.,* 28ff.

[31] Ferguson, *op. cit.,* 37; Wilcken, *Griechische Geschichte* (München, 1924), 189ff.

brated as gods in the Hellenistic cities.[32] To quote only one example of interest to students of Roman legal history: When the great Roman lawyer Q. Mucius Scaevola was governor in Asia Minor (94 B.C.), annual games as for a god were founded in his honor, the *Mukieia,*[33] and this sober lawyer and steadfast Republican accepted the fact. The *Mukieia* were celebrated for a long time.

For the Romans, to adapt themselves to the Hellenistic ruler cult was indispensable for ruling the Orient, but this was an impossible proposition as far as Rome and Italy were concerned. The upper strata abhorred absolute monarchs and god-kings. It had been Caesar's mistake to overlook this, when after the collapse of the Republic he attempted to rebuild the state with himself as dictator for life, and when he accepted divine honors after the Hellenistic pattern, though colored to Roman fashion. His statue, for instance, was to be erected with an inscription "to the unconquered god" in the temple of Quirinus (45 B.C.), and later in all the temples of Rome and Italy (44 B.C.). At the end of February 44 B.C. it was decreed that Caesar was to be called Jupiter Julius and to receive his own priests (*flamines*).[34] Shortly afterwards he was murdered by extremists of the Senate party. The struggle for power had begun. The Senate party, siding with Caesar's murderers, and Antonius with the masses of Rome behind him, faced each other.

In this situation there appeared Octavian, nineteen years of age, little known, and with a small following. But Caesar had adopted him as his son in his last will and testament, and Octavian soon proved to be a genius for propaganda.[35] Adroitly, he adapted himself to the temper of the masses, who had considered Caesar their political leader and bene-

[32] Taylor, *op. cit.,* 35ff.; Hammond, *op. cit.,* 5; Ensslin, *op. cit.* (n. 24), 18f.

[33] Kübler, RE, XVI, 439.

[34] Cf. the listing of the divine honors for Caesar, given by H. Heinen, *Klio,* VI (1911), 129ff.; Taylor, *op. cit.,* 65ff., 266ff.

[35] Syme, *Roman Revolution,* 116.

factor, and who—in contrast to the aristocratic republicans of the Senate party—venerated him more or less like a god. Soon after the murder, the mob had carried Caesar's body to the temple of Jupiter and requested his burial there. The priests, who belonged to the conservative aristocracy, had refused. Later (in April 44 B.C.), led by a Greek adventurer, the mob erected an altar on the Forum and offered sacrifice to Caesar.[36] Similar eruptions of popular feeling, however, had occurred in earlier times, for instance after the murder of the Gracchi. Now as then, they would have fizzled away, had they not been properly channeled and organized.

Octavian realized the political possibilities which a deification of his father Caesar had for his own position. If the dead Caesar were to became a god, a *Divus*,[37] Octavian would become *Divi Filius*, the god's son. His prestige would be enhanced enormously, and at the same time he would escape the reproach of aspiring to deification for himself while alive, as it had been done by Caesar. Octavian's competitor, Antonius, did just the opposite. His propaganda "built him up" as a god according to the Hellenistic pattern, as the incarnation of Dionysos.[38]

Chance aided Octavian. When, in the middle of July 44 B.C., despite the opposition, he staged pompous funeral games for Caesar, the *ludi victoriae Caesaris*, a comet appeared in the sky. Among the superstitious and excited masses a rumor sprang up: "There, up yonder, the comet, this is Caesar who has been received among the Gods."[39] At once, Octavian's propaganda was set in motion to confirm the people in their

[36] Taylor, *op. cit.*, 81ff.

[37] The word *divus* in early parlance was used as a synonym of *deus* (Nock, CAH, X, 471).

[38] O. Immisch, "Zum antiken Herrscherkult," *Das Erbe der Alten*, XX (1931), 17ff., 26; Kenneth Scott, *Class. Philology*, XIV (1929), 133ff.; Nock, *Journal of Hell. Stud.*, XLVIII (1928), 21ff.

[39] Suetonius, *Julius*, 88. Plinius, *Nat. hist.*, II, 93: "Augustus deemed this comet very propitious to himself . . . privately he rejoiced."

belief. As both Suetonius and Servius report, the spreading conviction that the comet was really "Caesar's star" (*sidus Iulium*) resulted from Augustus' *persuasio volgi* and *Augusto persuadente,*[40] that is to say, from his propaganda. *Divus Caesar* was said to have been removed to the gods in the same way as King Romulus—a legend that had been invented after the Greek pattern in the third century B.C.[41] It had become a common belief, familiar to every Roman child. The respect for traditions and for religion was a marked trait in Octavian's character,[42] but "old tradition" also belongs to the standard equipment of efficient propaganda—then as it does today.

Henceforth, Octavian worked for the official elevation of Caesar as a god, as *Divus Julius. Consecratio,* the reception of a new god into the religion of the Roman state, legally required a resolution of the Senate. Barely one and a half year later, on January 1, 42 B.C., Caesar was received among the gods of the state by law of the Senate and the people. Octavian was the driving force, although the act took place under the triumvirate.[43] In addition to Caesar's *concecratio,* it was resolved to build a special temple for the *Divus Julius.*[44] This, however, did not happen until thirteen years later, in 29 B.C. One of Augustus' first official acts, after the battle of Actium had given him undisputed power, was to build this

[40] Suetonius, *loc. cit.;* Servius, *ad. Aen.,* VIII, 681.

[41] On the Hellenistic atmosphere in which the deification of Caesar and, later, that of Augustus took place, cf. Hammond (*op. cit.* n. 24), 4ff. The divine honors granted to Caesar during his lifetime were hardly sufficient to warrant his apotheosis (differently, Taylor, *op. cit.,* 96f.).

[42] Charlesworth, CAH, X, 6.

[43] Cf. Syme, *op. cit.,* 471. As soon as Antonius recognized that the *consecratio* would aid his competitor, the *Divi Filius,* he began to oppose the endeavors to deify Caesar, or at least supported them only half-heartedly where he could not risk to do otherwise. The latter was the case when the vote for *consecratio* was taken. By this time the masses had been convinced that Caesar was a god (Suetonius, *Jul.,* 88; cf. Nock, CAH, X, 471).

[44] Cf. the passages cited by Heinen, *Klio,* XI (1911), 135.

temple. He thus made it clear that *Divus Julius* was to remain one foundation of his political-religious ideology.

To return, as Caesar had aspired, to rule as a god-king while alive was impossible after the Ides of March.[45] But it was equally inconceivable to create the position of the *princeps* on a legal-constitutional basis alone by renouncing any political-religious foundation. The old legal organization of the Republic had disintegrated during the Civil Wars. The legal form of the state had changed more than once with the victories of party leaders.[46] Loyalty to the state and its law no longer existed for the masses in Rome and Italy. They were wont to adhere to individual party leaders: Pompey, the Gracchi, Marius, Caesar, Antonius—and now, the overwhelming majority of the population followed Augustus. Relatively few stood sulkily apart.

Augustus avoided everything that could make him appear as a monarch, at least legally. As is well known, in 27 B.C. he restored the Republic. On a famous coin he designated himself as *Libertatis populi Romani vindex.* In reality, Augustus held the strongest power in the state. He had unrestricted command over an army of professional soldiers, devoted to him personally.[47] But he did not sit on bayonets. He was satisfied with a minimum of legal power.[48] He made use of a few institutions of the public law of the Republic, the *tribunicia potestas* and the *imperium pro consule.* In his *Res gestae* he lays emphasis, as is well known, upon his *auctoritas,* his high repute based on common consent, comparable to that enjoyed by the Senate throughout the Republic. So

[45] Von Premerstein, *Vom Werden und Wesen des Prinzipats* (Abhandlungen der Akademie der Wissenschaften, München, phil.-hist. Abt., N.F., 1937, Heft 15), 14f.; Kahrstedt in *Gött. Gel. Anz.* (1933), 206.

[46] Gelzer, *op. cit.* (above n. 2), 49ff.; von Premerstein, *op. cit.,* 13ff.; Syme, *op. cit.,* 61ff., 349ff.

[47] On the religious relation of the army to the *princeps* cf. Nock, CAH, X, 483f.

[48] Syme, *Journal Rom. Stud.,* XXXVI (1946), 155.

successfully did Augustus veil his legal and constitutional position that down to the present times distinguished scholars still are discussing what his rule really was, whether republic, or monarchy, or what kind of synthesis of both. The opinion is gaining ground that the form of Augustus' state cannot be classified under a precise notion of public law.[49]

In fact, Augustus attached no importance to the legal construction of his constitution in general. Nor were the Roman lawyers interested in this question. They had no science of public law.[50] There was only a philosophy of state corresponding to the Greek pattern, as transmitted by Cicero.[51] Rome did not possess a constitution in the sense of a basic law, founded upon general principles. Augustus, a statesman, not a lawyer, complemented the legal foundations of his new order by a political and religious ideology which was a means of impressing and guiding the human mind. In his ideology the *Divus Julius* once more constituted an important element. Augustus himself, during the Principate as in his beginnings, was satisfied with the part of the *Divi Filius*.

It is true that some authors attach little importance to the cult of the emperor and the phenomena related to it. The influence of such "mystical incantations" is sometimes rejected;[52] but this pragmatic approach underestimates the power of the emotional element. History does not follow the

[49] Schönbauer, in ZRG, XLI (1921), 82; von Premerstein, *op. cit.*, 166ff., 194ff.; Kahrstedt, in *Gött. Gel. Anz.* (1938), 7; H. Siber, *Zur Entwicklung der Römischen Prinzipatsverfassung* (Abhandlungen der Sächsischen Akad. d. Wiss., Leipzig, phil. hist. Kl., XLII, No. 3, 1933 [cf. the review of Syme, above n. 48]); W. Kunkel, *Römische Rechtsgeschichte* (Heidelberg, 1937), 35f., 144. These authors differ in various respects.

[50] Syme, *Journ. Rom. Stud.*, XXXVI, 158. On the preponderance of private law, cf. Schulz, *Prinzipien*, 19f.

[51] On the disputed question whether Augustus was influenced by Cicero and the Greeks, see von Premerstein, *op. cit.*, 7ff.; Kahrstedt, *Gött. Gel. Anz.* (1938), 5f.; differently Hammond, *American Journal of Philology*, LIX (1938), 481ff.; Kenneth Scott, *op. cit.* (above n. 24), 128f.

[52] A. Momigliano, *Journal of Roman Studies*, XXXIV (1944), 109f.; cf. R. Syme, *ibidem*, XXXVI (1946), 149.

laws of reason. *Divi Filius* meant a compromise between man and god,[53] between oriental and occidental ideologies. The same is true of the half-religious title *Augustus,*[54] conferred upon Octavian in 27 B.C., likewise at his own instigation. These *formulae* can perhaps be compared with the compromise, concluded a few months ago by the British government, in order to keep the Indian subcontinent in the Commonwealth and out of the Communist orbit. The English abandoned the claim that India acknowledge allegiance to the crown, but the King has been accepted as the "symbol" of the relationship. This modern compromise throws light upon the compromise of Augustus' days. In both cases seemingly "mystic formulae" are at work. But precisely these formulae stir the human mind and heart, thus contributing to solve practical problems of far-reaching consequences.

The spiritual atmosphere of the Augustan era favored the impact of political-religious ideas. It was a time when the influence of the Greco-Roman gods was waning, despite all efforts to revive them. Christianity had not yet entered the scene. The masses of Italy, particularly those of the great metropolis with its strong influx from the East, avidly grasped for oriental cults, especially those of Mithras and Isis.[55] Thus the soil was turned for Augustus' new political-religious ideology.

How intimately the public law and the new imperial cult were connected can be recognized, for instance, by the later inclusion of the *Divi Imperatores* in the oath of the officials.[56]

[53] Nock, CAH, X, 483.

[54] K. Scott, *Transactions American Phil. Assoc.,* LVI (1926), 82f.; von Premerstein, *Phil. Wochenschrift,* XLIX (1929), 848; Taylor, *op. cit.,* 158; Hammond, *op. cit.* (above n. 24), 11f.

[55] Cf. Franz Cumont, *Die Orientalischen Religionen im Römischen Heidentum* (3rd ed., Leipzig, 1931), 1-17 and *passim.*

[56] Wissowa, *Religion und Kultus* (2nd ed.), 79, 343; Mommsen, *Staatsrecht,* II (3rd ed.), 809.

The right of asylum, the *habeas corpus* of the ancient world,[57] was attached to their temples.[58] What is more than such legal details, the religious element which was contained in the position of the emperor as *Divi Filius,* the god's son, enhanced the respect and obedience accorded to him, his *auctoritas.* It strengthened his position to a higher degree than would ever have been possible by enforced legal rules, which could make the Romans only conscious of the loss of their republican liberty.

In his *Res gestae* Augustus says but little about this device of his policy. Like other acts of the emperor this report was calculated to impress the souls of men, not only by what was actually said but also by what was passed over in silence.[59] However, the importance for Augustus of his position as the sole *Divi Filius* had already been revealed when Caesarion, Caesar's natural son of Cleopatra, fell into Augustus' hands: he liquidated him without further ado.

In Rome, by law, Augustus was neither god nor monarch, but in the provinces he was god and king at the same time. In the East, the cult of the living ruler was an age-old institution, based on political and religious convictions.[60] In Egypt, Syria, and Asia Minor, Augustus permitted the native population to worship himself as a god during his lifetime. However, he took no chances: in Asia, as a rule—Egypt was

[57] F. von Woess, *Das Asylwesen Ägyptens in der Ptolemäerzeit* (München, 1923), 3.

[58] Mommsen, *op. cit.,* II, 760.

[59] Wilcken, *Sitzungsberichte d. Akad. Berlin,* XI (1932), 241: The *Res gestae* report about "die persönliche Auffassung des Prinzipatsbegründers über sein Lebenswerk . . . so wie er es von der Nachwelt aufgefasst wissen wollte." Kunkel, *Römische Rechtsgeschichte,* 37, calls the *Res gestae* "in erster Linie eine offizielle Propagandaschrift." The *Forum Augusti,* a national "Hall of Fame," also served propagandistic purposes. It connected great Romans of the past (even Marius and Sulla) with the ancestors of the emperor (from Aeneas down to *Divus Caesar*)—an enlarged counterpart to the *imagines maiorum* in the *atria* of the former *nobilitas.* Cf. H. T. Rowell, *op. cit.* (above n. 2), 140f.

[60] Cf. above pp. 13-15.

in an exceptional position[61]—he combined his own worship with that of the "Goddess Roma," who personified the people of Rome.[62] The device of elevating the *Demos* to be a god goes back to the Hellenistic Greeks in the period of their political decay. We find it in Athens in the year 229 B.C.: it was of comfort to the once proud democracy to worship herself as the goddess *Demos,* jointly with the Hellenistic kings who had been raised to the rank of city gods for political reasons. Later, when the powerful Roman Republic penetrated the East, many a Greek city readily exalted the *populus Romanus* to be the goddess *Roma.*[63] Augustus took up the idea of this, by now familiar, personification and added the *Dea Roma* to his own cult. Many temples were erected jointly to Augustus and Roma in the East. However, this applied only to the Greek population.[64] In accordance with his policy of differentiation, Augustus supplied the various groups of his subjects with different political and religious ideologies. For the Romans living in the East he remained the *Divi Filius* during his lifetime. Thus he ordered that the Romans in Ephesus and Nicaea should erect temples for *Roma* jointly with the *Divi Filius.*[65] In the semi-barbarian provinces of the West—Gaul, Spain, and Germany—the cult of the emperor was newly established.[66] Here, the cult served also as a means of pacification.

It is interesting to notice how effective Augustus' political-religious ideology and propaganda were even in Italy and Rome. Even there, people began to worship Augustus as a

[61] On Augustus' position in Egypt see W. Otto, *Priester und Tempel im Hellenistischen Ägypten,* I (1905), 58; Wilcken, *Grundzüge und Chrestomathie der Papyruskunde,* I (Leipzig, 1912), 32; Taylor, *op. cit.,* 121ff.

[62] Wissowa, *op. cit.,* 338ff.

[63] Wissowa, *loc. cit.;* Ferguson, *op. cit.,* 39.

[64] Cf. for the Greeks in Pergamum and Nicomedia, Nock, CAH, X, 485 n. 3.

[65] Wissowa, *op. cit.,* 341.

[66] Kornemann, *Klio,* I, 108ff.; Taylor, *op. cit.,* 202, 282f.; Nock, CAH, X,, 486; Ensslin, *op. cit.* (above n. 24), 23f.

living god—over and above the *Divi Filius.* As a rule he discouraged this extravagant adoration.[67] Such early efforts to deify the emperor before his death remained the private cult of municipalities or individuals. They did not become an official cult of the Roman state. As Augustus had wished, it was only after his death that the Senate elevated him to be a god in the cult of the state, *Divus Imperator.* This religious policy, as established by Augustus, was essentially preserved during the two and a half centuries of the Principate. In their lifetimes the emperors—with a few exceptions such as Caligula, Domitianus, and Commodus—contented themselves with remaining *Divi Filius.*[68]

From the precedent of Caesar's deification, from its repetition after Augustus' death, the procedure of the *consecratio imperatorum* became established. The Senate customarily elevated only the so-called "good" emperors to the rank of *Divi,* while for the bad ones the *damnatio memoriae* was proclaimed. In this the philosophical principle of the recognition of good deeds may be noticed. It also reconciled the educated classes.[69] To be sure, this *Totengericht,* as Mommsen called it, did not always reach a decision according to true justice. Politics frequently turned the scale. This explains how Claudius happened to be deemed worthy of *consecratio* as the first emperor after Augustus—a fact which provoked Seneca's

[67] Augustus made a few concessions when the memory of the Ides began to fade. Since about 12 B.C. he connected the worship of his *Genius* with that of the *Lares compitales* at the crossroads, "the only Roman cult to the poor." It was a device to implement his policy of differentiation between the various classes (Nock, CAH, X, 480, 484ff. and in *Mélanges Bidez,* II, 63ff.; Taylor, *op. cit.,* 185ff., 246; cf. the remarks of Kahrstedt, *Gött. Gel. Anz.* [1933], 208f. and von Premerstein, *Phil. Wochenschrift* [1933], 1115f.).

[68] Cf. Tacitus, *Ann.,* 15, 74 ("deum honor principi non ante habetur, quam agere inter homines desierit"), and Tertullian, *Apol.,* 34 ("maledictum est ante apotheosin deum Caesarem nuncupare"). Cf. Wissowa, *op. cit.,* 81; Bickermann (above n. 24), 25, 81; Nock, *op. cit.,* 496f.; Ensslin, *op. cit.,* 28, 35; Kenneth Scott, *The Imperial Cult under the Flavians* (1936), 102ff.

[69] Plinius, *Nat. Hist.;* cf. Kenneth Scott, in *Arch. für Rel. Wiss.,* XXXV, 126.

political satire, although he himself had composed a beautiful eulogy for Claudius.[70] Sometimes those emperors whose right to succession was doubtful, such as Hadrian, worked for the deification of their predecessors and adoptive fathers, so as to legalize their own position. Sometimes the Senate, likewise for political reasons, delayed the deification, as for instance after Hadrian's death.[71]

How the deification of the dead emperors grew into an institution of the Principate may be seen by the way in which its procedure was developed. After the death of Augustus, the ex-praetor and senator Numerius Atticus swore as a witness before the Senate that he had seen Augustus raised to heaven from the pyre. Here again was a subtle connection with the legend of Romulus' removal to heaven, which likewise had been attested by a witness under oath.[72] Augustus' widow rewarded the witness with a million *sestertii* for his loyal deposition. The requirement of evidence by a witness under oath (*iurator*) was adhered to until about the middle of the first century A.D. We do not know about such a testimony when Trajan died.[73] By and by, the elevation of the emperors was considered so natural that the witness was dispensed with. One was satisfied with a symbol. Since the end of the first century an eagle was released from the burning fire,[74] and the Roman people were convinced that the bird carried the soul of the emperor to heaven. The vehicle of apotheosis varied. According to the representation on coins, the emperor flew

[70] O. Weinreich, *Senecas Apocolocynthosis* (Berlin, 1929), 9. The political element in Claudius' apotheosis and in Seneca's satire is emphasized by Vittinghoff, *op. cit.* (above n. 24), 109.

[71] Bickermann, *op. cit.*, 16ff.

[72] Suetonius, *Octavian,* 100; Dio, 56, 46, 2. Cf. K. Scott, *op. cit.* (n. 69), 130.

[73] According to *Papyrus Giss.,* 1.15ff. (= Mitteis-Wilcken, *Chrestomathie,* I, 2 no. 491) the god Apollo in person announced Trajan's ascension to his successor (cf. Kornemann, *Klio,* VII, 278ff.; Weinreich, *op. cit.,* 24f.).

[74] Cf. recently Vittinghoff, *op. cit.,* 77-80, 106-108; Kornemann, *Gnomon,* XIV (1938), 494; H. T. Rowell, *op. cit.* (above n. 2), 132.

to heaven sometimes on a *quadriga,* sometimes even on a peacock.[75]

Only from the end of the third century onwards, did the worship of the dead emperors cede the first place to the cult of the living rulers. Under the absolute monarchy, when the center of gravity of the empire shifted toward the Orient, the living emperor himself became the bearer and symbol of public law and political ideology.

Strange as it may appear today, the political importance of the cult of the deceased does not belong to the "antiquities" which are of interest only to scholars in their ivory towers. The power of the dead and of death over the human mind is so great that it has been used again and again to strengthen the political power of the living, at different times, in different countries, and in different accoutrements. It is a curious fact that even a state of which it should be least expected, Soviet-Russia, who is so proud of her materialistic philosophy, has not dispensed with the political cult of the dead, as is demonstrated by the enshrinement of Lenin's body in front of the Kremlin and by the endless stream of worshippers, passing by his tomb. They worship a *Divus Imperator*—made in Russia.

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[75] Bickermann, *op. cit.,* 10.

BUREAUCRACY AND THE ROMAN LAW

I. *Introduction* *

THE nature of bureaucracy was the topic studied in one of the earliest of the so-called University Seminars of Columbia University. It was as reporter on the administration of government of ancient Rome that the author first became aware of the close connection between the jurists of the period of the Roman Principate and the bureaucratic organization of the state. This topic formed part of a Law lecture delivered at Vassar College in 1944, and served as the basis of a paper read at the annual meeting of the American Historical Association in December of that year. Herewith is given the first presentation of my conception of the relation between bureaucracy and law in the times of the Principate to those interested in Roman law. The topic seems particularly appropriate further, in that the recent volume of Professor Schulz devoted to the history of Roman juristic science stresses, at some length, the interrelation of the Roman jurists and public office, although his conclusions as to the significance of this relation differ considerably from those of the author.[1]

* Two radical abbreviations are employed in the notes: RE = *Realenzyklopädie der klassischen Altertumswissenschaft*, ed. by Pauly-Wissowa-Kroll-Mittelhaus; SZ = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.*

[1] Schulz, *History of Roman Legal Science* (1946). In a review of his book in *Yale Law Jour.*, 57 (1947), 324ff., I have commented on his treatment of the bureaucratic aspects of juristic science.

II. *The Historical Development of the Imperial Bureaucracy* [2]

It is generally conceded that no true bureaucracy is cognizable during the epoch of the Roman Republic. The *cursus honorum* of the Republican magistrates was a political career, without a particular apprenticeship, unsalaried and consisting of a series of unrelated offices, separated by periods spent in private life.[3] Again, it might be argued that the subalterns in the Republican administrative system make up a corps of civil service. Though these public servants (*apparitores*) undoubtedly were the experts who carried out the business of the various offices, they never could hope to rise to magisterial rank.[4] The nearest approximation to a bureaucratic set-up in the Republic may be found in the administrative staff of the tax-farming associations, but this was purely a private enterprise and not part of the organization of the state.[5] Caesar had revolutionary plans for the reorganization of the Roman state, but Augustus, at the start, made only minor additions to the administrative corps. As financial assistants to the

[2] The material in this section is largely based on the "Retrospect" (*Rückblick*), the concluding chapter of the leading book in the field, Hirschfeld, *Die kaiserlichen Verwaltungsbeamten bis auf Diocletian* (2d ed., 1905), 466ff. Further citation to these pages is omitted.

[3] The full picture of the magisterial career is presented in the first volume of the great work of Mommsen, *Römisches Staatsrecht* (3d ed., 1887); on the aspects here referred to, pp. 517ff., 527ff., 536ff. Specifically on the *certus ordo magistratuum*, see Kübler, "Magistratus," RE 14 (1930), 405-06.

[4] Mommsen, *op. cit.*, pp. 332ff., is the leading authority. Cf. also Herzog, *Römische Staatsverfassung*, I (1884), 855ff., and Karlowa, *Römische Rechtsgeschichte*, I (1883), 193ff. By what amounted to a "closed shop", including the privilege of disposing of their posts by sale, these civil servants exercised an influence far above their social standing. Specialization of jobs existed to a high degree.

[5] Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* (1908), 403ff., has an excellent study of the legal nature of these associations; the full picture of the administrative personnel, management and operation, by Kniep, *Societas publicanorum* (1896). Note that a number of tax-farming administrators were employed as imperial procurators, when the state took over the collection of the taxes (Kniep, pp. 43ff.).

(senatorial) governors of the imperial provinces he appointed a new type of officer, not a *magistratus,* but a *procurator,* drawn from the ranks of the equestrian class.[6] It was not long before further reforms were necessary, and at home, in the city of Rome. The revived census failed in its tasks and *curatores* for the food supply, aqueducts and public works, named in conjunction with the senate, were appointed. These did not succeed and Augustus had to take upon himself the whole administration of the city, appointing as his representatives new officers known as *praefectus vigilum, praefectus annonae* and *praefectus urbi.*[7] There is no evidence that Augustus originally had this in mind, or that he or Tiberius sought significantly to curtail the role of the senate in government. Circumstances forced the change. Augustus and the early emperors did not disdain to use slaves and freedmen in these new offices, but they further recognized the necessity of having a reliable group of free men to draw upon. Provincials could not be used because of the uncoordinated nature of the empire, the plebs had sunk too low: so Augustus turned to the knights, thus laying the foundation for the equestrian procuratorian career.[8]

Before long the entire administration needed revamping. This was accomplished during the reign of Claudius, largely by the freedmen Pallas and Narcissus. These two elevated their own positions to the highest stature, and provided the imperial house with an accounting office, a secretariat, and a bureau of petitions. The whole state administration, aqueducts, food, games, libraries, fleet, imperial patrimonium, were

[6] On the procuratorship consult, besides Hirschfeld, *op. cit.,* 410ff., the earlier work by Liebenam, *Beiträge zur Verwaltungsgeschichte des römischen Kaiserreichs* (1886), and an English study, Mattingly, *The Imperial Civil Service of Rome* (1910), 28ff., 102ff.

[7] The constitutional basis is discussed by von Premerstein, *Vom Werden und Wesen des Prinzipats* [Abhand. d. Bayer. Akad. d. Wissensch., philos.-hist. Abteil., Neue Folge, Heft 15] (1937), 133ff., 142ff., 208ff.

[8] On the re-establishment of the equestrian rank, and drawing heavily upon it, see Herzog, *op. cit. supra* note 4, vol. II (1887), 362ff.; briefly Stevenson, *Roman Public Administration* (1939), 114ff.

each headed up by freedmen, some independent, others the aids of senatorial *curatores* or equestrian prefects. The climax in this reorganization was the granting of judicial (civil) competence to the imperial procurators in the provinces and the new officials at Rome, both equestrians and freedmen.[9]

There was a slight lull during the reign of Vespasian, who saw no reason why senators should not be as valuable as equestrians for the higher offices. Otherwise equestrians and freedmen shared the civil service until the time of Hadrian. It was this emperor, Hadrian, who gave an entirely new texture to Roman officialdom.[10] First of all, he drew a clear line between the administration of the empire and that of the imperial household. The former lost its private character and became an official body. Freedmen were replaced by equestrians in all of the higher posts. A fixed career was provided, with advances in salary and rank. A new office, the *advocatus fisci,* took over the judicial duties and permitted the procurators to devote themselves wholly to imperial administration.[11] The higher offices at Rome were made state offices and were headed by equestrians, as a stage in the official career. The *consilium principis,* advisory council of the emperor, was completely reorganized and filled largely by equestrians.[12] All of this seems to have been a conscious plan for the purpose of having the equestrian rank replace the senatorial in the administration of the state.

The reforms of Hadrian continued substantially unchanged throughout the remainder of the era of the Principate.[13] The treasuries were filled without too great a drain on the prov-

[9] Sherwin-White, "Procurator Augusti," in *Papers of the British School at Rome,* 15 (1939), 11ff.

[10] Besides Hirschfeld, see also Schurz, *De mutationibus in imperio romano ordinando ab imperatore Hadriano factis* (1883), 12ff., and Lacey, *The Equestrian Officials of Trajan and Hadrian* (1917), 38ff.

[11] The position of *advocatus fisci* is treated by Hirschfeld, pp. 48ff.

[12] References *infra,* note 28.

[13] Cf. the special study of Stein, *Die kaiserlichen Verwaltungsbeamten unter Severus Alexander* (1912).

inces, and an excellent bureaucracy of free men developed to administer the empire. Septimius Severus made some changes in line with his policy, which attempted to give the provinces a position equal with Rome; thus imperial procurators were named to replace senatorial magistrates in the city of Rome, the last stronghold of the senate. A possible restoration of senatorial power under Alexander Severus evidenced by the relative independence of the (senatorial) *praefectus urbi* and governors of senatorial provinces, together with the elevation of the alter ego of the emperor, the *praefectus praetorio,* to senator, and the concurrent lessening of the influence of procurators, did not extend beyond the rule of that emperor. With the middle of the third century this survey, largely based on the studies of Hirschfeld,[14] may be closed, for it is the age from Augustus to Alexander, more particularly from Hadrian to Alexander, that is of concern here. The participation of the jurists in certain imperial offices during this latter period and the effect of this upon the Roman law merits particular attention. It is necessary, therefore, to dwell at some length upon certain phases of the imperial service in the following section, and to tie up the individual jurists with this new structure.

III. *The Bureau Structure of the Post-Hadrianic Era*

From the time of the reorganization under Hadrian a substantial portion of the bureaucratic service was affected with a juridical tinge. In the earlier empire the assistants of an emperor were largely appointed to act as his representatives in the provinces. Like the senatorial *cursus honorum,* the procuratorian career began with military service.[15] This re-

[14] Besides the volume frequently referred to, the first edition of this work, *Untersuchungen auf dem Gebiete der römischen Verwaltungsgeschichte,* vol. I (1877), deserves attention. Also a masterly presentation in a few pages by Hirschfeld, "Zur Geschichte der römischen Kaiserzeit in den ersten drei Jahrhunderten," in his *Kleine Schriften* (1913), 911ff.

[15] The military service which preceded entry into equestrian rank is fully treated by Stein, *Der römische Ritterstand* (1927), 135ff. On the provincial procuratorian career, Hirschfeld, *op. cit. supra* note 2, pp. 371ff., 410ff. [cf. p. 411 n. 4 on the title *procurator Augusti*]; Liebenam, *op. cit. supra* note 6, pp. 6ff., 15ff., 103ff.

mained true to the end of the Principate for the greater part of the bureaucracy, especially that concerned with the administration of the provinces and the army. Hadrian, however, established a new apprenticeship for another type of bureaucrat. This was juristic training for a civil career.[16] After this training the law student or the practising advocate might be appointed either *advocatus fisci* (legal counsel for the treasury) or secretary of one of the higher bureaucrats. This was followed by a specific civil career, quite distinct from the ordinary procuratorian career. The first significant office might be as chief of one of the bureaus of the secretariat, which had been completely reorganized by Hadrian. Some of these bureaus interest us little because they have no direct connection with legal matters.[17] Three, however, are worthy of further attention.

First, a correspondence bureau, *ab epistulis,* with its Latin and Greek sections, was organized to handle the voluminous exchange of letters between the emperor and his representatives in Italy and the provinces.[18] Besides all the official dispatches to and from governors and commanders and the official transactions with the outside municipalities and corporations, this bureau drafted the patents appointing the lower procuratorian and military officers as well as the imperial privileges granted by letter. All the official correspondence except the emperor's personal letters were drafted, copied and even filed in this bureau. A large personnel was utilized, and the chief, at least of the Latin section, was frequently of renown in the literary world.

A second bureau, that of petitions, *a libellis,* was, like the bureau *ab epistulis,* of little political significance, but it was

[16] *Hirschfeld,* pp. 426ff.

[17] There were a number of other bureaus and departments with occasional judicial duties, cf. Hirschfeld, pp. 65ff. (*a censibus*), 216ff. (*praefecti alimentorum*), 334ff. (*scrinium a memoria*).

[18] Hirschfeld, pp. 321ff.; Rostowzew, "ab epistulis," RE 6 (1909), 210ff.; Cuq, *op. cit. infra* note 28, pp. 363ff.; Peter, *Die geschichtliche Litteratur über die römische Kaiserzeit bis Theodosius I und ihre Quellen,* I (1897), 336ff.

the bureau primarily concerned with legal questions.[19] Space does not permit a lengthy exposition of the distinction between the two different types of rescripts that were drafted in response to these petitions, namely, the epistles of the emperor (actually drawn up by the bureau *ab epistulis*) directed to provincial officials in answer to legal questions, and the *subscriptiones* (drafted by the bureau *a libellis*) answering the legal questions raised by the petitions (*libelli*) of private persons.[20] It is sufficient to point out that within a very short time the practice of rescripting by *subscriptiones* became the accepted method. This represents the bulk of the imperial answers to legal questions preserved for us, both in the Digest and in the Code of Justinian. The chief of this office was, as might be expected, a man gifted in the legal field, whose chances of promotion to higher rank were almost certain.

And finally, an extraordinary court which was presided over by the emperor, in first instance or on appeal, was provided with an assisting officer, perhaps as early as the reign of Claudius. This officer was replaced by Hadrian with a special bureau, presided over by an equestrian official.[21] Some authorities believe that this bureau, *a cognitionibus* (on trials), aided the emperor in drafting his decision (*decretum*) or engaged in a preliminary examination, but it is now generally conceded that the bureau prepared the court calendar, communicated the initial procedural action to the parties, provided the court stenographer and kept the record of the case.[22] With the gradual extension of the activity of the em-

[19] Hirschfeld, pp. 326ff.; von Premerstein, "a libellis," RE 13 (1927), 15-26.

[20] This distinction was first carefully worked out by Wilcken, "Zu den Kaiserreskripten," *Hermes,* 55 (1920), 1-40; cf. further, von Premerstein, "libellus," RE 13 (1927), 30ff., 48f. It has generally been accepted, e.g., Jolowicz, *Historical Introduction to the Study of Roman Law* (1939), 374ff.

[21] Hirschfeld, pp. 329f.; von Premerstein, "a cognitionibus," RE 4 (1901), 220-22.

[22] Hirschfeld, *Untersuchungen, cit. supra* note 14, p. 209, and Karlowa, *op. cit. supra* note 4, p. 545, thought that the bureau chief aided the emperor in preparing his decisions for the cases before him; Cuq, *op. cit. infra* note 28, p. 379, believed the bureau officer held a preliminary inquiry. The view expressed above as now prevailing, in Hirschfeld and von Premerstein, *loc. cit. supra* note 21.

peror's court, the significance of this legal office and, accordingly, of its chief increased.

Ranking above these and other bureaus of the secretariat stood the five prefectures, four of which were regularly held by equestrians. These were generally ranked, from lowest to highest, as follows: *praefectus vigilum* (Minister of Public Security), *praefectus annonae* (Minister of Food), *praefectus urbi* (Mayor of Rome), *praefectus Aegypti* (Governor of Egypt) and *praefectus praetorio* (Commander of the Guard, vice-Emperor). Not many of the bureau chiefs reached the highest position, but there is sufficient evidence to show that all but the urban prefecture—an office held by men of the senatorial rank [23]—were steps in the civil equestrian career, for which juridical study had provided the preliminary training.

The emperor Augustus appointed the first *praefectus vigilum* to act as the chief of the corps of firemen and night policemen guarding the city of Rome.[24] This official was granted an extensive criminal competence over arson, theft, receipt of stolen property and the like, in addition to his administrative functions. By the third century a certain measure of civil jurisdiction was reposed in him. He heard cases involving rents, suits involving trade associations, and possibly actions against bankers. The office, therefore, was a natural step in promotion for one of the bureau chiefs who had legal training. Slightly higher in rank was the office of *praefectus annonae,* who was at the head of a vast entourage of civil servants supervising the transportation and distribution of grain in the city of Rome.[25] The grain markets, weights and meas-

[23] The office of *praefectus urbi* was one of the most significant in the senatorial career during the Empire, see *infra* note 37. On the office, see Vigneaux, *Essai sur l'histoire de la praefectura urbis à Rome* (1896), and von Premerstein, *op. cit supra* note 7, pp. 142ff. The close relation of the *praefectus urbi* to the other imperial officials rather than to the old Republican magistracies carried over into the Empire is pointed out by von Premerstein, p. 146f.

[24] Hirschfeld, pp. 253ff.; Karlowa, pp. 557ff.

[25] Hirschfeld, pp. 234ff.; cf. also his article, "Die Getreideverwaltung in der römischen Kaiserzeit," *Philologus,* 29 (1870), 1ff.; Karlowa, pp. 555ff.

ures, and price fixing of grain were under his control, and he had his agents in various ports and throughout the grain-producing provinces. Again, a substantial portion of the functions of the *praefectus annonae* were legal in nature, including competence of suits between shippers and shipmasters, as well as the civil and criminal actions arising directly out of the activities of the department at Rome. The next step in the career, to which the *praefectus vigilum* or *praefectus annonae* might be appointed, was the office of governor of Egypt, *praefectus Aegypti*.[26] Save for a few direct appointees of the emperor, the whole of the enormous administrative corps of this province was under his control. He was the head of the judicial, as well as the financial and military branches of government, and appeal from the decisions of his court lay only to the emperor. The highest post in the equestrian career was that of prefect of the guard, *praefectus praetorio*.[27] Originally he was merely the commander of the emperor's personal guards, and consequently his trusted representative, but this office gradually assumed political significance second only to that of the emperor. During the second century civil powers were added to the military and the office was frequently held by civil and military colleagues. The civil *praefectus praetorio* served as judge of his own court, a court of first instance or on appeal from the lower prefects of Rome; he served as a member of the council of the emperor, perhaps even chairman thereof, and thus played a major role in the administration of justice generally. He served, too, as vice-judge for the emperor himself in the latter's court.

Distinct from the bureaucratic career, but even more significant for the direction of legal policy was the *consilium prin-*

[26] See generally, Reinmuth, *The Praefect of Egypt from Augustus to Diocletian* (1935). Also Stein, *Untersuchungen zur Geschichte und Verwaltung Aegyptens unter römischer Herrschaft* (1915), 110ff., 187ff.

[27] See generally, Howe, *The Pretorian Prefect from Commodus to Diocletian* (1942), especially pp. 10ff., 32ff., 49ff., with a chronological list, pp. 65ff. Cf. also Durry, *Les cohortes prétoriennes* [Biblioth. des écoles franç., fasc. 146] (1938), chap. VI; Passerini, *Le coorti pretorie* (1939), pp. 205ff.

cipis, council of the emperor.[28] In the first century the emperors were wont to call on members of their retinue and on trusted friends as well as on senators and subordinate officials for advice. Apparently as part of the general reform that saw the codification of the edict and the reorganization of the imperial secretariat and offices, Hadrian added full-time paid legal members to the council. These men were either jurists or legal assistants of lower rank.[29] The *consilium* took the lead in handling judicial affairs for the emperor and shared in the preparation of the imperial constitutions. Though it became more and more a general governmental advisory board under Septimius Severus, and later even a council of the empire under Alexander, it continued during this epoch to be the directing force in legal policy.

Appointment to the various offices in the equestrian career, as well as to the permanent posts in the *consilium principis,* rested solely with the emperor.[30] From the time of Hadrian there was normally regular advancement in office. This procedure might, of course, be varied at the will of the emperor. The term of office was generally fixed, and reduction in rank was unusual; suspension from the service or even stronger penalties were decreed for the unworthy bureaucrat. Rank was completely tied up with salary. In the course of time four regular salary classes were worked out: 60,000, 100,000, 200,000 and 300,000 sesterces. Entry into the service would normally be at the 60,000 sesterces rank, e. g. the *advocatus fisci,* or subordinates in the bureaus or prefectures such as the *procurator ad annonam Ostiis* (grain controller at Ostia), or the legal assistants to the *consilium, adsumpti in consilium.*

[28] The classical study is by Cuq, "Mémoire sur le consilium principis d'Auguste à Dioclétien," in *Mémoires Acad. des Inscrip. et Belles-lettres,* Ie série, 9.2 (1884), 311-504. See also Hirschfeld, pp. 339ff.; Hitzig, *op. cit. infra* note 32, pp. 29ff.; Orestano, *Il potere normativo degli imperatori e le costituzioni imperiali* (1937), 51ff.

[29] The jurists were of equestrian rank, Hirschfeld, p. 340 n. 2; *contra,* Cuq, p. 341. The references to assistants of lower rank are given by Hirschfeld, p. 340 n. 3.

[30] On the matters in this paragraph, cf. Hirschfeld, pp. 430ff.

Within the next class were a score of senior bureau assistants, including the *subpraefectus annonae* and *vigilum*. The chief of the bureau of Greek correspondence was in the 200,000 sesterces class, while at least in the third century, the chiefs of the bureaus *ab epistulis Latinis, a libellis* and *a cognitionibus* were in the highest regular class of 300,000 sesterces. This means that the equestrian prefectures received as much or more than this amount so that the two highest, *praefectus Aegypti* and *praefectus praetorio*, must have been very remunerative jobs.

A vast subordinate civil service was needed to aid in the administration of the multifold activities of the Roman empire.[31] The civil bureaus and prefectures to which special attention has been called employed a substantial portion of this staff. These lower jobs were at first held by slaves and freedmen of the imperial house. Later freedmen and free employees predominated. No career is involved here. Advancement to even the lowest procuratorian post was exceptional. Indeed, these servants remained at the same posts or in the same department for years, and consequently were the static elements that, in view of changing chiefs, enabled the business of the bureau to be carried on. Bookkeepers, cashiers, scribes, archivists, announcers, watchmen were to be found in almost all departments. Special assistants were employed whenever necessary. In addition, each official was entitled to employ a legal assistant, an *assessor*, to help him personally in the drafting of decisions or framing of decrees.[32]

Finally, to complete the picture of the bureaucracy of the late Principate, attention must be called to the archives.[33]

[31] Hirschfeld, pp. 457ff.; cf. also Duff, *Freedmen in the Early Roman Empire* (1928), 143ff.

[32] See Hitzig, *Die Assessoren der römischen Magistrate und Richter* (1893), especially pp. 96-126; the commixture of classical and post-classical references is unfortunate.

[33] See generally von Premerstein, "commentarii," RE 4 (1901), 737ff., 753ff., and "a commentariis," RE 4 (1901), 759-66; on the possibility of archival records as precedent, von Schwind, *Zur Frage der Publikation im römischen Recht* (1940), 139ff., 164ff.

There was no single archives bureau but rather a lower personnel of one or more archivists in each of the bureaus. But the exact nature and purpose of record-keeping in this epoch are not entirely clear. The preservation of the imperial enactments that were framed by the various bureaus, for example, may very well have been for the mere purpose of providing an authentic copy in the event of attack. Nevertheless, there seem to have been various collections of the instruments that were filed in the archives. Just how far they were employed as precedent for future action or to what extent they were available for inter-departmental or private use is still quite uncertain.

IV. *The Jurists and the Bureaucratic Career*

It is with the bureaus of the secretariat and the prefectures of the late Principate just described that the Roman jurists came into close contact. The status of the jurists of the Republic and the extent of their functions is too well known to need much comment here.[34] Almost to a man they were of the senatorial class. They frequently passed through several, if not all, of the steps of the *cursus honorum*. Their juristic activity seems completely divorced from their political posts. They are above all responsible for the development of the private law, the *ius civile* and subsequently the *ius honorarium*. This development they accomplished in part by the counsel they offered the judicial magistrate (*praetor*) or to the private-person judge (*iudex*). Even more were the jurists responsible for making the Roman law a "juristic law"[35] par excellence by means of the opinions they rendered to private party litigants upon legal questions, actual or hypothetical, when these were proposed to them.

[34] See, among others, Schulz, *op. cit. supra* note 1, pp. 49ff.; Krüger, *Geschichte der Quellen und Litteratur des Römischen Rechts* (2d ed., 1912), 49ff.; Berger, "Iurisprudentia," RE 10 (1919), 1159-1200; Biondi, "Interpretatio prudentium e legislazione," *Bull. d'Ist. di Dir. Romano,* 43 (1935), 139ff.

[35] On this, see recently, Koschaker, *Europa und das römische Recht* (1947), 95ff., and generally, pp. 164ff.

With the establishment of the empire further fields were opened to the jurists, but their interest remained the development of the Roman law by means of the *ius respondendi,* now supported by the emperor's approbation,[36] and, to a greater extent than in earlier times, setting forth their legal knowledge in commentaries on the civil and praetorian law and in "case" books. Most of the jurists are still members of the senatorial class, and quite frequently they follow the senatorial *cursus honorum.*[37] It is indeed striking that during the first century of the Empire none of the jurists of equestrian rank hold any procuratorian posts.[38]

A distinct change in the jurists' activities is brought about by the reforms of the emperor Hadrian. The codification of the edict terminates the direct influence of the praetor upon the law, and with it goes the help of the jurists in drafting new forms. In its place the imperial constitutions prepared by the reorganized bureaus become the source of new law, which the jurists cannot afford to neglect.[39] From this time on every magistrate connected in the slightest degree with judicial matters, be he old-time *magistratus* (as consul or praetor) or new imperial official (as *praefectus urbi* or *praetorio*), had at his side a permanent legal advisor, an *assessor.*[40] Legally trained

[36] Schulz, pp. 112ff., with further bibliography, p. 112 n. 4.

[37] A number of jurists of the early Principate held the office of consul or praetor. Nerva was *procurator aquarum*, Neratius Priscus was *praefectus aerarii*, Pegasus was *praefectus urbi*, and some were provincial governors. Whether the jurists had close contact with the consuls and special praetors (*praetor tutelarius, praetor fideicommissarius, praetor de liberalibus causis*) who, as imperial officials, had judicial competence, is a question that needs further study. The basic work of Jörs, *Untersuchungen zur Gerichtsverfassung der römischen Kaiserzeit* (1892), does not adequately distinguish between pre-Hadrianic and post-Hadrianic times.

[38] So Karlowa, *op. cit. supra* note 4, pp. 657ff.

[39] Pernice, "Volksrechtliches und amtsrechtliches Verfahren in der römischen Kaiserzeit," in *Festgabe für Georg Beseler* (1885), 69ff.

[40] *Supra*, note 32.

persons began to appear as *advocati fisci* or as lower bureaucrats.[41] Hadrian and his successors increasingly called upon the jurists who were members of the equestrian class to take part in the *consilium principis*. All this was reflected in the careers of the jurists during the century that follows, in so far as biographical data are available.

Some details in the lives of seventeen jurists from the time of Hadrian to Alexander Severus are available to us.[42] Of four of these it is known only that they were members of the imperial *consilium*: Ulpius Marcellus, Claudius Tryphoninus, Messius and Arrius Menander. It is almost certain that all these were equestrians, for the last jurist of senatorial rank to be so honored was Julian. Five other jurists are known to have held various posts in the senatorial *cursus honorum*. But four of these five are jurists whose careers began before Hadrian's reforms were well under way. Salvius Julianus was the jurist whom Hadrian employed in fashioning some of his reforms, Aburnius Valens held his first office the year after Hadrian's accession; Pactumeius Clemens and Vindius Verus were consuls in 138, not even ten years after the compilation of the edict. Only one jurist, Licinnius Rufinus, pupil of Paulus, was consul and held other offices in the provinces.

In contrast to this one possible instance of jurist in the senatorial career, there were seven, perhaps eight, jurists who held posts in the equestrian career. If the M. Caecilius Afri-

[41] References in Hirschfeld, p. 428f.; cf. also the list of *jurisperiti* in Hitzig, *op. cit supra* note 32, pp. 206ff. Was Marcius Claudius Agrippa, born a slave, raised to knighthood and named *advocatus fisci,* banished and later recalled by Caracalla and appointed *ab epistulis* and *a cognitionibus,* a jurist? Cf. Stein, *op. cit supra* note 15, p. 120.

[42] Biographical data in Schulz, pp. 104ff.; Roby, *An Introduction to the Study of Justinian's Digest* (1886), clxiii ff.; Krüger, *op. cit supra* note 34, pp. 182ff.; Voigt, *Römische Rechtsgeschichte,* II (1899), 249ff.; De Francisci, *Storia del diritto romano,* II.1 (2d ed., 1938), 485ff. Three jurists, Iavolenus Priscus, Iuventius Celsus and Neratius Priscus, who were in Hadrian's *consilium* at the culmination of long careers, are omitted from consideration as belonging to the pre-Hadrianic era.

canus who was a military prefect (*praefectus cohortium*) was the jurist Africanus, it is possible that this office, charged with judicial functions, marks the beginning of his public service. Inscriptions recently discovered reveal that L. Volusius Maecianus held among other posts that of military prefect, assistant to the curator of public works, the chief of the bureau *a libellis*, *praefectus annonae* and finally *praefectus Aegypti*. Besides this he was in the *consilium* of Pius, Marcus, and Verus; a splendid instance of a full equestrian career. We know that Cervidius Scaevola was *praefectus vigilum* in 175 and a member of Marcus' *consilium*. Tarruntenus Paternus was *praefectus praetorio*, while Papinian rose from the ranks to the top of the equestrian career. Both Paul and Ulpian held a succession of bureau posts, whether the former became *praefectus praetorio* or not.[43] Finally, Herennius Modestinus was *praefectus vigilum* in the well-known fullers' company case.[44]

It seems perfectly clear that the status of a jurist altered considerably in the epoch after Hadrian. If he entered upon a public career, and the majority seemed to have participated in state service, it was in the new imperial bureaucracy and not in the old senatorial *cursus honorum* nor even in the provincial procuratorian career. Several served in the bureaus or imperial offices, some even reached the post of *praefectus praetorio*, second to the emperor in the realm. Almost all the later jurists functioned in the councils of the emperor, the body guiding the legal policy of the state. It is only natural, then, that they played a considerable role in the formulation of the new law that gradually was evolved to supplement the traditional *ius civile* and *ius honorarium*.

[43] Upholding the contemporaneity of Paul and Ulpian in the office of *praetorio praefecto*, Balogh, *Études d'histoire juridique offertes à P. F. Girard*, II (1913), 339ff. Denying the prefecture of Paul, Howe, *op. cit. supra* note 27, pp. 105f.

[44] *Lex Iulium de pensione solvenda*, Bruns, *Fontes iuris romani antiqui* (1909), 406.

V. *Ius novum and the Jurists*

In the early years of the Principate little change is discernible in the nature of the private law from that of Republican times. The jurists continue to dwell upon the old institutions of the *ius civile* and in their comment on the edict of the praetor carried on the development of the *ius honorarium.* Within the first century, however, a new type of *senatus consulta* as well as imperial enactments frequently treated of the private law. There may have been no basic innovations, as Schulz maintains, but the jurists could not neglect the effect of such measures as the *senatus consulta Trebellianum* and *Pegasianum* in a discussion of the law of testamentary succession.[45] More and more did the jurists note the rules laid down in the imperial constitutions.[46]

A decided change came with Hadrian. The codification of the edict brought about the termination of development of the law by praetorian *formula.* Whether conscious design or not, the rescripts of the emperor took the place of the latter.[47] Upon petition of a litigant, the imperial bureau *a libellis* drafted an answer to the legal question proposed, which was then presented to the judge and eventually to the opposing party; this was the so-called procedure by rescript, paralleling the proceeding before the praetor. Rescripts also vitally affected the nature of the jurists' *responsa.* It was by this means that the emperors resolved the controversies of the schools, and it seems that the *responsa* were of no validity if contrary to imperial enactment.[48] As a recent writer has ex-

[45] Schulz, p. 128f. The relation of the jurists to the *senatus consulta* of the early empire is revealed by the comments of the jurists themselves to the individual *senatus consulta,* as well as by the author of an excellent article, Volterra (?), "Senatusconsulta," in *Nuovo Digesto Italiano,* 12.1 (1940), 30, 35ff.

[46] Orestano, *op. cit. supra* note 28, pp. 39ff., collects the references regarding the treatment of imperial enactments previous to Hadrian.

[47] Pernice, *op. cit. supra* note 39, pp. 69ff.; cf. Wenger, *Institutes of the Roman Law of Civil Procedure,* trans. Fisk (1940), 317ff.

[48] Massei, "Le citazioni della giurisprudenza classica nella legislazione imperiale," in *Scritti di diritto romano in onore di Contardo Ferrini* (Pavia 1946), 403 n. 1, affirms the opinion of another recent writer, De Robertis, in this regard.

pressed it, "a contradictory rescript robs the earlier juristic law of its effect, a later (*responsum*) strengthens the imperial norm."[49] The jurists themselves, as a number of references show, recognized the validity of the rescripts of the emperor.[50]

An even more important intrusion into the old law resulted from the development of the *cognitio extra ordinem* as an alternate process to the *ordo iudiciorum* (formulary procedure).[51] For the newly created magistracies and imperial offices were entrusted with civil and criminal competence over matters within their sphere of action, while the emperor's court intervened in matters of first instance and appeal. As Wenger says,

> disputes in the administrative field of the consuls of the early Empire and of the special praetorships relieving them, of the people's tribunes of the Empire, of the *praefecti vigilum* and *annonae,* of the *praefectus urbi* and other magistrates; disputes in matters of *fideicommissa,* guardianships and the public treasury, protection of slaves, demands for maintenance and support, claims for *honorarium* [salary], certain matters of status, and other matters were disposed of by way of state *cognitio* without a folk-judge court.[52]

It is not proper to term the rules of law that flowed from the decisions of these courts mere administrative law; in great part it controlled the relations between private persons, and

[49] De Robertis, "Sulla efficacia normativa delle costituzioni imperiali," in *Annali d. Fac. di giuris. d. R. Univ. de Bari,* n.s., 4 (1941); this work is inaccessible to me but has been fully reviewed and commented upon by Wenger, SZ 63 (1943), 490ff., and Massei, *loc. cit.*

[50] Collected by Orestano, pp. 88f.

[51] The groundwork in this field was the work of Pernice referred to *supra,* note 39; cf. also Boyé, *La denuntiatio introductive d'instance sous le Principat* (1922), 16ff.; further references by Wenger, *op. cit.,* 255ff., and Monier, *Manuel élémentaire de droit romain,* I (5th ed., 1945), 188ff.

[52] Wenger, pp. 258f. Itemization of matters tried by *cognitio extra ordinem,* with references, Bekker, *Die Aktionen des römischen Privatrechts,* II (1873), 194ff.

the fact that difficulties were ironed out before state courts did not alter its nature.[53]

The legal principles laid down in imperial constitutions or in decrees of a senate under the control of the emperor, together with the body of law fashioned by the state courts employing the *cognitio* procedure, have been termed *ius novum* by modern scholars.[54] This was the law that served imperial policy, it was provided to satisfy the social and economic needs of the time.[55] The attempt to minimize its significance has been successfully countered by the wealth of evidence presented by Riccobono in a score of works.[56] The truly creative work of the emperor and his administrative and judicial functionaries in building up a *ius novum* established norms which had not been included within either the *ius civile* or *ius honorarium* or *ius gentium*. This is not to be considered an anomalous body of law wholly foreign to Roman tradition, but a creation ex novo of truly fundamental institutions which are

[53] Pernice, *op. cit. supra* note 39, pp. 62ff., calls the law administrative; recent scholars would include it within the private law, e.g. Sanfilippo, *Pauli Decretorum libri tres* (1938), 129ff.; Biondi, *Prospettive romanistiche* (1933), 51ff.; Orestano, pp. 61ff.

[54] First broached by Rudorff, *Römische Rechtsgeschichte*, I (1857), 11ff., and expanded upon by Kuntze, *Excurse über Römisches Recht* (2d ed., 1880), pp. v ff., 312ff., 374ff., 400ff., and in other writings, the concept was critically attacked by Wlassak, *Kritische Studien zur Theorie der Rechtsquellen* (1884), 51ff., who held that there was no third portion of Roman law in addition to the *ius civile* and *ius honorarium* during the Principate. In accord with Wlassak was Karlowa, *op. cit. supra* note 4, pp. 641ff.; Mitteis, *op. cit. supra* note 5, p. 39 n. 1. Early doubts upon Wlassak's views were expressed in a review by Pernice, SZ 6 (1885), 290ff. For the present view, see notes 56 and 57.

[55] Cf. von Premerstein, *op. cit. supra* note 7, pp. 198ff.; Grosso, *Premesse generali al corso di diritto romano* (2d ed., 1946), 102ff.

[56] Particularly in *Archiv f. Rechts-u. Wirtschaftsphilos.*, 16 (1922/23), 520ff.; in a series of articles in *Mélanges de droit romain dédiés à Georges Cornil*, II (1926), 235ff.; and in "La formazione di un novum ius nel periodo imperiale," *Atti del I° Cong. naz. di Studi Romani*, II (1929), 235ff.

an essential part of the Roman classical law; *fideicommissum* is a typical example.[57]

That the jurists took account of this new law is self-evident. We have seen that the later classical jurists played a prominent role in bureaucratic service. As bureau chiefs they were responsible for the drafting of the constitutions; as prefects they delivered the opinions that went to make up the *ius extraordinarium,* as the law developed in the *cognitio extra ordinem* has been termed. Our sources show that the private opinions (*responsa*) of the jurists are often utilized in the rescripts of the emperors under whom they served.[58] There is need of a good deal more research in order to determine the actual participation of the juristic bureaucrats before, during, or after their terms of office, in the development of the *ius novum.* It must also be kept in mind that the advice and influence of the jurist-members of the *consilium principis* and those jurists who were praetorian prefects, on imperial legislation and governmental policy was of prime importance during the late classical epoch.[59] The close tie-up between jurists and the administration of government should be reflected in the juristic writings which have come down to us, the point to be examined in the following section.

VI. *Juristic Literature and Bureau Practice*

The clearest proof of the existence of the new type of bureaucrats is afforded by the wealth of texts on administrative law written by them in the age of the Severi.[60] These

[57] The summation of Riccobono's views and the position taken by most recent writers are given by Baviera, "Salvatore Riccobono e l'opera sua," in *Studi in onore di Salvatore Riccobono,* vol. I (1936), lxxxi ff.

[58] Massei, *op. cit. supra* note 48, pp. 414ff. (citing Dig. 5.1.2.4; 31.67.9; 37.14.17; 41.3.18).

[59] For the influence of the jurists under the Severi, see Howe, *op. cit. supra* note 27, pp. 44ff.

[60] Schulz, *op. cit. supra* note 1, pp. 139, 242ff.; cf. Karlowa, *op. cit. supra* note 4, pp. 671ff.

works belong to a special literary genus and have a style all their own; there is no literary precedent and no tradition. The style of writing, as Schulz points out, approaches that of the imperial chancellery. It is not necessary to enumerate the types of offices whose legal activities formed the subject matter of these works; suffice it to say they ranged from the *praetor tutelarius,* who by legislation was given the power of appointing guardians where none had been provided otherwise, to the proconsul, the governor of a senatorial province.

The *ius novum* is in part reflected in the juristic literature by special works in both the procedural and substantive fields.[61] Paul and Callistratus are responsible for treatises on the *cognitio extra ordinem,* while Paul also wrote a book, *De iure libellorum,* the exact nature of which is unclear but may well have to do with procedure by rescript. Ulpian's *De omnibus tribunalibus* deals with the matters handled by the courts of the imperial magistrates.[62] A number of late jurists wrote on the appellate procedure, a type of *cognitio extra ordinem.* Besides this, there are one or two collections of decisions of the imperial courts; Paul's *Imperialium sententiarum in cognitionibus prolatarum* are probably cases in the court at which Paul had assisted. From the substantive law point of view there were monographs, first and foremost, on *fideicommissa,* but also such as Modestinus' *De manumissionibus,* Paul's studies of various *senatus consulta* and constitutions, besides a number of works on criminal, fiscal and military law.

In spite of the large number of works expressly devoted to various aspects of the *ius novum,* the total number of such books would not be very impressive when compared with the voluminous works of the late jurists written in the traditional

[61] Schulz, pp. 247ff., 255ff.

[62] Cf. specially on this item, Pernice, "Das Tribunal und Ulpian's Bücher 'de omnibus tribunalibus,'" SZ 14 (1893), 135ff., and Kübler, *Festschrift für Hirschfeld* (1903), 58ff. But cf. Wlassak, *Zum römischen Provinzialprozess* [Sitzber. d. Akad. d. Wissen. in Wien, philos.-hist. Kl., 190.4] (1919), 62ff.

forms, namely, the commentaries on the civil law, the commentaries on the edict, and the various types of what has been termed problematic literature (*digesta, responsa, quaestiones,* etc.).[63] But all these works, I believe, are replete with discussion of the new law. Of the 344 references to imperial enactments in the fragments of Ulpian in the Digest, which have been enumerated by Massei,[64] 142 are to be found in his commentary on the edict, 48 in his commentary on the civil law (*ad Sabinum*), and 154 in all of his other works. An examination of the late jurists would show that the imperial legislation was well integrated into the old-style juristic literature, even if the *ius novum* had not been completely absorbed into the *ius civile* and *ius honorarium.* Besides frequent mention of rescripts in the collections of *responsa* and *quaestiones* or *digesta* of the jurists, there is an even more significant factor to be pointed out. Long ago, in a monograph primarily devoted to the nature of the *cognitio extra ordinem,* Samter maintained that the problematic literature of the late jurists was not limited to the *responsa* directed to private party or *iudex,* but actually included a great number of decisions rendered by state judges in the *cognitio* procedure.[65] Samter holds that Papinian, Scaevola and Modestinus intermingled *responsa* and judgments, and there really is no reason to deny his thesis; no one has as yet made a careful study of the matter.[66] Since that time there has been but little reference to the reflection

[63] For definition and scope of the "problematic" literature, see Schulz, pp. 223ff.

[64] *Op. cit. supra* note 48, p. 417 n. 3.

[65] Samter, *Nichtförmliches Gerichtsverfahren* (1911), 9-63, particularly pp. 12ff., 17ff., 31ff., 61ff.

[66] Although the thesis that Samter advanced as to the nature and course of the *cognitio extra ordinem* was sharply criticized in the two leading reviews of his work (Berger, *Grünhuts Zeit.,* 40 [1914], 311ff., and Steinwenter, *Krit. Viertelj. f. Gesetzgeb. u. Rechtswiss.,* 52 [1914], 59ff.), both of these writers admitted the *a priori* possibility of the commixture of *responsa* and judicial decisions in problematic works. Von Premerstein, *op. cit. supra* note 7, pp. 199ff., cites Samter with approval.

of the law in the traditional juristic literature,[67] but recent studies of Orestano, De Robertis and Massei seem to indicate that these scholars would subscribe to the position that not only in works that by their very titles indicate a detailed presentation of the new order, but even in their commentaries and *responsa,* the late jurists introduced all the pertinent principles of the *ius novum.*[68]

VII. *Conclusion*

I have indicated that the imperial bureaucracy was completely reorganized in the time of Hadrian, and that the bureau structure as well as many of the imperial offices with judicial functions ascribed thereto were made for occupancy by legally trained personnel. I have attempted also to show that our well-known jurists took advantage of these opportunities to cooperate more fully with the new force, the emperor, who had taken unto himself by his constitutions and his courts the guidance and development of the law. The jurists, as officials or in *consilium,* came more and more into prominence as the dynamic factors behind this development and their occupation with these tasks is amply reflected in their writings. These points alone would be sufficient to justify a re-examination of the evolution of the classical law within the epoch of the Principate itself. In addition, further study may reveal implications that are sociological or even psychological in import.

It may be that the Roman jurists of the Empire tried to fight the creation of administrative bureaus and imperial

[67] Note, however, De Visscher, *Conferenze per il XIV Centenario delle Pandette* (1931), 64; and Schulz, p. 225, says: "A *disputatio* described as having taken place *in auditorio* is sometimes one which had taken place in court, not in the lecture-room. Such disputations also were recorded in the problematic literature; many a so-called *responsum,* the origin of which is undisclosed, may thus have been given in the course of a disputation."

[68] My supposition is based upon Orestano, *op. cit. supra* note 28, pp. 86ff.; De Robertis, *op. cit. supra* note 49, as reported by Wenger, p. 496; Massei, *op. cit. supra* note 48, pp. 420f., 433f.

courts, though this seems unlikely. Shortly after the bureaus were reorganized they participated, and they acted as judges of the courts. We know that it was they who largely fashioned the law that was evolved therein. They took unto themselves rather than strove to suppress the new forces in the development of the law. It seems to follow, then, that their whole outlook on the nature of law itself was altered. They must have been affected with a deeper appreciation of the problems of the administration of the state. Even their conceptions of the nature of private law and its place in the legal structure may have changed. A careful examination of the writings of the jurists prior to Hadrian in comparison to the writings of the jurists after Hadrian would reveal, in my opinion, two different systems of private law.[69] The earlier would be typical " juristic " law, conservative at heart, primarily looking to the adjustment of the interests of individuals and largely aloof from any concern with the interest of the public (state) in the application of the private law. The latter would be a combined juristic-legislative system, fully aware of the change in social, economic and political trends, putting these into effect in the realm of private law, thus balancing the interest of the individual against the concerns of the public at large. I have presented a suggestive hypothesis. I hope to demonstrate the validity of this hypothesis by exegetical researches at a future date.[70]

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[69] De Visscher expressed the same opinion in the article cited *supra* note 67, where he says, p. 64f.: " The great classical works may be considered the fruit of the parallel activity of the jurists as consultants and as members of the imperial council. They are the product of the collaboration of the jurists with the emperor. . . . Juridical science of this epoch [subsequent to Hadrian] tends to take on a character very different from that which it had under the Republic or during the first century of our era."

[70] This article was completed in the summer of 1947. Unforseen circumstances delayed its publication until this time. References noted as unavailable have been obtained in the meantime, and several pertinent articles could be added to the citations. But the general thesis has not been expressed by another. The first of the exegetical studies to which reference is made will appear in *Mélanges De Visscher.*

EX POST FACTO IN ROMAN SOURCES AND EX POST FACTO LAWS IN MODERN JURISTIC TERMINOLOGY

For Max Radin
the Septuagenarian

A ROMANIST whose legal education began with Roman legal sources and whose juristic thinking has been nurtured on them may have a strange feeling when he meets the term " ex post facto law " for the first time. He certainly will recollect that he has read its Latin part in those sources, but the linking of *ex post facto* with *lex* or with *constitutio* or *senatusconsultum* will be unfamiliar to him, if not incomprehensible. And yet he will not be able to shake off the impression that the Latin words must go back to Roman legal sources even though their sense in the modern combination is certainly alien to the Roman juristic language, in which, in fact, they never did acquire a specific, technical meaning. Rather perplexed, the legal historian will feel the desire to return to the familiar, ancient source material and to try to reconcile the Roman expression with its modern counterpart.

Such thoughts led the writer to collect the pertinent texts from the Roman legal sources and to study the use of the words *ex post facto* by the Roman jurists and by the emperors in their constitutions—a study for which there is no precedent in either Romanistic or modern juristic literature.

I.

The locution *ex post facto* is not rare in Roman legal sources. It occurs in twenty-two texts of the Digest [1] and in

[1] They are listed in *Vocabularium Iurisprudentiae Romanae,* II, 649, vv. 4-10, where, however, one text is missing: Dig. 49.17.9, *infra,* Text 14.

three imperial constitutions of Justinian's Code, including one by the emperor himself. The spelling of *post facto* is not uniform. Both in Mommsen's edition of the Digest and in Krüger's edition of the Code it appears several times [2] as one word, *postfacto,* but more frequently as two words. In older editions of the Corpus Iuris (Beck, Kriegell) the first form prevails. The great Latin glossaries show the same lack of consistency: Du Cange and Forcellini write *postfactum,*[3] although in the latter's opinion "rectius divisim scribuntur" [4]; Stephanus and Brissonius,[5] on the contrary, write it disjunctively. Even some quotations of texts from the Digest appear in Brissonius with a spelling different from Mommsen's. There is no doubt, however, that both forms are correct: Latin words (nouns, verbs, and adjectives) composed with *post* in the adverbial sense (= *postea*) are well known, but so is *post* written as a separate word in similar constructions. To be brief and remain within the framework of the juristic texts we refer to *ex post delicto* in Dig. 29.2.71.9 [6] and to the analogous *ex ante gesto* which appears not less than eight times in the Digest alone.[7] In the face of these instances it is hard to see why the *Oxford Dictionary* remarks that "the separation of postfacto in current spelling is erroneous."

What is more important than the spelling, and must be pointed out explicitly, is that *post* is here used as an adverb, and not as a preposition which requires the accusative (*post factum*), and that the ablative *facto* (*postfacto*) depends

[2] See *infra,* Texts 4, 7, 9, 12, 19, 22, 25.

[3] Thus also Gesner, *Novus Linguae Latinae Thesaurus* (1749), 973.

[4] (Ed. Prati, 1868), IV, 752.

[5] *De verborum significatione,* s.v.; similarly Nolten, *Lexicon linguae Latinae antibarbarum* (1780).

[6] Gesner (*op. cit.*) writes *postdelicto.*

[7] Cf. *Voc. Iur. Rom.,* I, 460, vv. 8-10. An analogous structure, preposition + adverb + noun, occurs in the phrase *ex supra scriptis;* see *Voc. Iur. Rom.,* II, 652, vv. 44-46.

upon the preposition *ex*. *Ex post facto* cannot therefore be simply identified with *post factum*.[8]

The following survey deals with our phrase in juristic texts only. The writer was unable to find it in any literary source by consulting the various lexica of literary Latin works and the hitherto published parts of the *Thesaurus Linguae Latinae*. It must be very rare in literature, if not absent completely, since the earlier glossaries mentioned before do not give a single illustration from sources other than legal.[9] The reliable *Thesaurus* by Stephanus, after quoting one legal text, even makes the characteristic remark: "sic saepe alibi apud iurisperitos."

The list of pertinent texts reveals that the best stylists among the classical jurists of the second and third centuries did not hesitate to use *ex post facto;* it occurs from Pomponius and Gaius, through Marcellus, Papinian, Ulpian, and Paul, down to the last representatives of the classical jurisprudence, Marcian and Modestinus. Even an obscure jurist of minor authority, known only from a few texts, Licinnius Rufinus,[10] a pupil of Paul, is represented by one passage in the list. Ulpian and Paul appear most often therein, which is in conformity with the general statistics of the Digest; for their works were excerpted in the largest measure by the compilers. With the inclusion of a constitution of Justinian, the term *ex post facto* is attested for a period of more than four centuries without any change of meaning.

Following are the texts in chronological sequence, from Justinian's Digest (Texts 1-22) and Code (Texts 23-25), with a brief statement of the factual circumstances and the legal

[8] Cf. the text before note 25, *infra*. For *post id factum* in literary sources, cf. Nepos, *Pelop.*, c. 5; Caesar, *B.G.*, 5.58.7.

[9] Only Du Cange, *Glossarium* (ed. Paris, 1845), V, 373, mentions an unpublished contract between a bishopric and another ecclesiastical institution (the date is not indicated) in which the phrase occurs, *si ex post facto apparuerit*. It is good classical Latin we shall meet below in Texts 4 and 11.

[10] Cf. Berger in Pauly-Wissowa, *Real-Enzykl.*, XIII, 457f.

situation in each case. The question whether or not the phrase appears in an interpolated portion of a text is irrelevant for our purposes. It may be noted, however, that with very few exceptions the term occurs in sentences which have so far escaped suspicion.

1. Pomponius, *libro VI ex Plautio,* Dig. 12.1.8: A loan given under a suspensive condition depends "upon what happens afterwards": *mutui datio interdum pendet ut ex post facto confirmetur.* In the meantime the loan remains in suspense in order to be confirmed by a later event which will determine whether the loan had been efficiently given or not.

2. Gaius, *libro VII ad edictum provinciale,* Dig. 41.1.43.2: *A*'s slave who is in usufruct of *B,* bought another slave without paying the price. If the payment made by the buyer afterwards was from the usufructuary's money, the purchased slave becomes *B*'s property; if, however, the money belonged to *A,* then *proprietarii* (= *A*'s) *ex post facto fuisse videtur.* "From the later event," i.e., depending upon whose money was used for payment, it results who becomes owner of the purchased slave.

3. Marcellus, *libro XXIII Digestorum,* Dig. 35.2.56.1: If a slave's *peculium* increased after the death of his master, but before the heir's entry on the inheritance, or if a debt conditionally owed to a testator became effective by realization of the condition after his death, the jurist's opinion is: *ex post facto uberiorem fuisse videri hereditatem.* "From a later fact" it appears that the estate had become larger, which is important with regard to certain rights of the heir, as, for instance, the so-called *quarta Falcidia.*[11]

4. Papinian, *libro VII Responsorum,* Dig. 7.1.57 pr.: A man bequeathed his landed property to the usufructuary as a legacy. If the testament was nullified afterwards the legatee was obliged to return the property, but as Papinian says, *mansisse* [*usus*] *fructus ius ex post facto apparuit.* Since the

[11] See *infra,* Text 11.

ownership bequeathed became void, the usufruct remained untouched for it resulted from the later fact, i.e., the annulment of the testament.[12]

5. Papinian, *libro XII Responsorum,* Dig. 39.5.31.2 (cf. Frg. Vat. 255): A father, in emancipating his daughter, left her the slaves he had previously donated her together with the pertinent *peculia.* If he did not revoke the *peculia* until his death,[13] *ex post facto donationem videbitur perfecisse.* It appears " from this later fact " that his donation was made also with regard to the *peculia.* The *factum* here was a passive attitude, a non-doing.[14]

6. Papinian, *libro II Definitionum,* Dig. 45.1.124: A stipulation to build a house within two years is not considered unfulfilled before the full two years have elapsed, even though so little time remains that the work cannot possibly be achieved. The nature of a stipulation which was limited from the beginning by a fixed term cannot be changed " by a later fact ": *neque enim stipulationis status, cuius dies certus in exordio fuit, ex post facto mutatur.* Here, too, the post factum consists in a negative attitude of the person involved.

7. Tryphoninus, *libro XVIII Disputationum,* Dig. 49.17.19.5: In this thoroughly interpolated text our locution is not fully preserved since the word *post* is missing. Most of the editors—since Haloander—have inserted it, however, and this correction has been generally accepted.[15] The use of the phrase reminds us of that in Text 2, referring to ownership being in suspense, where " from later facts " the legal situation might be concluded. The issue is whether the object in question was the father's property or not: *si in pendenti, ut in*

[12] Cf. Dig. 5.2.21.2.

[13] This results from Frg. Vat. *cit.*

[14] Cf. Lenel, *Palingenesia,* Pap. 687; Kübler, *Jurisp. anteiust.,* II, 2, ad Frg. Vat. *cit.;* Siber, *Zeitschrift der Savigny-Stiftung,* Rom. Abt. LIII (1933), 128.

[15] *Ex facto*—without *post*—is a well-known locution in legal sources. Cf. *Voc. Jur. Rom.,* II, 641, 19ff.

aliis,[16] *et in hac specie habemus dominia, ut ex* [*post*] *facto retro fuisse aut non fuisse patris credamus.*

8. Ulpian, *libro XII ad edictum* (with reference to Julian), Dig. 4.6. 17 pr.: An *usucapio* of an estate, not entered upon by the heir because he had fallen into captivity, can be stopped when the prisoner of war obtains a *restitutio in integrum* after his return and makes the declaration of acceptance of the inheritance. If, however, he fails to do so, it is evident " from this later event " that the *usucapio* has not been interrupted at all and has run continuously: *ex post facto usucapionem processisse manifestatur.* This again is a case in which the *post factum* was a non-doing by a person who was required to act in order to achieve a legal effect.

9. Ulpian, *libro XXIX ad edictum,* Dig. 15.3.10.9: The text deals with the *actio de in rem verso.* Somebody who had such an action against another afterwards became his debtor, and later his creditor for the same sum. The particular situation provoked the question: *an renascatur de in rem verso actio, an vero ex postfacto non convalescat* (whether the action mentioned arises anew or does not recover its validity from the later event)?

10. Ulpian, *libro LXXI ad edictum,* Dig. 43.24.7.4: If somebody destroyed a neighbor's building in order to prevent the spread of a fire, the owner of the damaged property has neither cause of action for damages nor the interdict *quod vi aut clam.* If, however, there was no fire at all or if it broke out after the damage had already been done, the decision about the action and the interdict is affirmative because with regard to the question whether actionable damage was done or not, it is the situation at the moment of destruction which is decisive, and not what happened later: *quia non ex post facto, sed ex praesenti statu,*[17] *damnum factum sit necne, aestimari oportere.*

[16] This allusion to other similar cases raises the saying to a more general rule.

[17] *Praesens status* means the situation created by the action which caused the damages.

11. Ulpian, *libro LXXIX ad edictum,* Dig. 35.2.47 pr.: Legacies exceeding three quarters of the estate were proportionally cut down according to the *lex Falcidia.* If, however, an annual allowance is bequeathed to a legatee and the three quarters would be exceeded only by a later payment, the heir's right to a deduction can be established only after a certain lapse of time, if the legatee is still living. Therefore the jurist says: it will appear from a later event (*sed hoc ex post facto apparebit*) whether the Falcidian statute in case of pensions shall be applied or not.

12. Ulpian, *libro XIX ad Sabinum,* Dig. 40.4.7: A testator granted his slave liberty on condition that at the time of his death he would leave no son (*si mihi nullus filius erit cum moriar*). But the possibility of a posthumous son suspends the effectiveness of the manumission until it is ascertained that there will be none. The answer whether the slave has been freed or not, can therefore be given only "from what later happened": *ex postfacto respondemus retro liberum fuisse nullo filio nato.*

13. Ulpian, *libro XXI ad Sabinum,* Dig. 30.41.2: A legacy which was void from the beginning does not become valid by a later fact: *si quidem ab initio non consistit legatum, ex post facto non convalescet.* This is a general rule which may, of course, be applied to other situations.[18]

14. Ulpian, *libro XLV Disputationum,* Dig. 49.17.9: In connection with some cases of succession concerning the so-called *peculium castrense* of a soldier deceased in captivity, the jurist states: it is not new that from a subsequent event it results that someone had a successor (*nec est novum ut ex postfacto aliquis successorem habuisse videatur*).

15. Paul, *libro III ad edictum,* Dig. 2.14.17.4: An agreement in favor of a third party (*pactum in favorem tertii*) was null in Roman law. It cannot get validity "from a later fact"; *quia ex post facto id confirmari non potest.* Cf. *supra,* text 13.

[18] Cf. *infra,* Texts 15, 19, 22, 23, 24.

16. Paul, *libro XXVII ad edictum,* Dig. 50.17.138.1: *Numquam crescit ex post facto praeteriti delicti aestimatio.* The *aestimatio* of a crime committed never does increase from a later fact. The *aestimatio* not only means the criminal aspect of the wrongdoing, but also refers to the damages suffered by the person injured. The rule is of importance when the offense leads to two different actions, as, for instance, when a stolen thing was later destroyed, or a stolen slave killed, by the thief. In the action for theft only the theft itself will be taken into consideration. Cf. Dig. 47.2.28.[19]

17. Paul, *libro II ad edictum aedilium curulium,* Dig. 21.1.44.2: *A* sold *C* a slave belonging to *B*. Afterwards the slave, who became ill in the meantime from an old physical defect, was claimed by *B* from the purchaser *C*. The question arose whether *A,* liable under his stipulation for the dispossession, was moreover liable for the concealed defect of the slave. The answer is in the affirmative because the purchaser was interested in having the services of a sound slave and the fact that the slave had been restored to the real owner does not diminish the seller's obligation (*neque ex postfacto decrescat obligatio*). The jurist rejects the objection that the purchaser was no longer interested in the health of the evicted slave.

18. Paul, *libro V Quaestionum,* Dig. 23.5.10: The text deals with an alternative obligation. A person promised as a dowry one of two pieces of land whichever he himself would select. Then he sold them both, but subsequently redeemed one. "From this later fact" it results that the alienation of the other was lawful (*certe ex post facto videbitur recte alienatus*).

19. Licinnius Rufinus, *libro II Regularum,* Dig. 50.17.210: An institution of a *heres* which was originally invalid cannot become valid from a later fact (*quae ab initio inutilis fuit institutio, ex postfacto convalescere non potest*). It is the same rule we find in Text 13. Justinian's compilers gave it

[19] Cf. Levy, *Konkurrenz der Aktionen* (1918-20), I, 464f., II, 30, n. 3; Jolowicz, *Digest 47.2. De furtis* (1940), 42. The text is not mentioned in Mommsen, *Strafrecht* (1899).

general application by including it in the title "On General Rules," Dig. 50.17.

20. Marcian, *libro II Regularum,* Dig. 34.5.15(16): A testator bequeathed an object belonging to his estate to a legatee. Before the latter had declared his acceptance, the heir disposed of the item. If afterwards the legatee rejects the legacy, the alienation by the heir acquires full validity. The case gave the jurist opportunity to formulate the following statement: *quaedam sunt, in quibus res dubia est, sed ex post facto retro ducitur, quid actum est.* There are matters which at first are uncertain, but "from a later fact" it may be concluded what transaction had been made.

21. Marcian, *libro I Institutionum,* Dig. 40.11.2: When the emperor grants a freedman the so-called *restitutio natalium,* i.e., the privilege of a free-born, the man actually born as a slave ceases to be considered a freedman and becomes a free-born under the law from a later event (*interdum et servi nati ex post facto iuris interventu ingenui fiunt*). The *post factum* is here an imperial enactment, by which a personal privilege was granted to an individual.[19a]

22. Modestinus, *libro VII Differentiarum,* Dig. 20.1.22: A person pledged something belonging to another, without the owner's knowledge. Afterwards the owner became the heir of the former debtor. The pledge was, of course, void from the beginning, and consequently did not gain validity from the later event (*ex postfacto pignus non convalescit*). This decision is in full conformity with the rules known from other texts, cf. Texts 13, 15, 19.

We now turn to Justinian's Code, which offers three texts pertinent to our inquiry.

[19a] B. Cohen, *Proceedings of the American Academy of Jewish Research,* XVI (1947), 34, writes that the emperor would grant freedmen the rights of *ingenui* (free born) "by virtue of an *ex post facto iuris*" [sic]. The phrase reveals a misunderstanding of both the grammatical construction and meaning of the text; it is by no means explained by the bibliographical reference in n. 146, *loc. cit.,* which has nothing to do with the *restitutio natalium.*

23. Cod. Just. 5.6.3 (the Emperor Gordian): If after the conclusion of a valid marriage any circumstances occur which would have been a hindrance to its validity, the marriage remains unaffected by the later event: *rite contractum matrimonium ex post facto vitiari non potuerit.* This rule is an application of the foregoing one to an inverse situation, since here the legal transaction was valid at the beginning.

24. Cod. Just. 8.55(56).2 (the Emperor Probus, a. 277): The imperial rescript starts from a principle similar to the one expressed in the preceding text: what has lawfully acquired validity cannot be rendered doubtful "from a later fact": *ne id quod iure vires acceperat, ex post facto possit in dubium revocari.*

25. Cod. Just. 6.30.21.2 (Justinian, a. 531): Somebody appointed a *heres* by the following words: "*A*, the slave of *B*, shall be my heir." The emperor assumes that such an institution of a heir is made for the benefit of the slave's master, and therefore the slave can be compelled to accept the inheritance for his master, even if he believes himself to be free and is involved in a trial concerning his status against the master. The inheritance will be acquired for the master, of course, and if afterwards the slave should be declared free, he will not suffer any harm "from this later event" (*nulli autem ex postfacto subici gravamini*) since all gains and losses redound to the man who contested his liberty. Here the *post factum* is the judgment by which the slave's liberty was established.

II.

In the light of the foregoing quotations and their connection with the legal situations to which *ex post facto* refers, we may now attempt an analysis of its significance.

a. The phrase occurs, it is true, in juristic texts, insofar as we were able to establish,[20] but it is not a specific, technical juridical term.

[20] For literary texts see *supra*, before n. 9.

b. The noun *factum* is very often used in a broader sense than *quod factum est,* "what was done."[21] *Factum* means not only what was really done by someone, be it a lawful or a void transaction, a judicial judgment or an imperial privilege, but also an event which is independent of human action,[22] a happening without any active contribution by the person who will profit by, or bear the consequences of, the subsequent event. In several cases the *factum* was a non-doing, a passive attitude of the person involved, *cf.* Texts 5, 6, 8. In no instance, however, was *factum* used in the sense of a criminal offense.

c. One may speak of a *post factum* only when the fact occurred later than another one. There cannot be a *post factum* without a previous fact with which it is being brought into a temporal relationship. The previous "fact" need not be of the same nature as the later one. We have seen that it could be a legal situation created by a contract or a unilateral act (legacy, donation); it might be liberty, ownership, damages, etc., whereas the *post factum* could be any event that, for instance, implied the fulfillment of a condition. At any rate, such a relationship must exist between the two facts that the second event is presumed, rightly or not, to exercise a certain influence on the existence, validity, or juristic valuation of the first. Without this intrinsic connection between the two facts, *post factum* remains a torso. Not one of the texts quoted leaves any doubt about this. Sometimes this connection is even pointed out once more, in addition to *post,* by such words as *retro* (Texts 7, 12, 20), *praeteritus* (16), *ab initio* (13, 19) or by mentioning the meantime between the two facts (*interdum* in Text 1).

d. We cannot help recalling the rather elementary rule of Latin grammar that the preposition *ex,* in the sense of "from," "out of," must be preceded or followed by a verb (or its

[21] Cf. Dig. 20.4.11.2: *quod posterius factum est.*

[22] The Greek translation of *ex post facto* is: ἐκ τῶν μετὰ ταῦτα γεγονότων. Cf. Bas. 2.3.210 = Dig. 50.17.210 (Heimbach, I, 78).

derivatives) upon which it depends and which requires the preposition *ex*. In the foregoing passages we found a group of such verbs, as *apparet* (4, 11),[23] *videtur* (2, 3, 5, 15, 18), *aestimatur* (10), *manifestatur* (8),[24] *retro ducitur* (20), *in dubium revocari* (24), *credamus* (7). All these expressions imply a thinking operation: concluding, estimating, believing, considering evident, and the like " from what happened afterwards." Another group of texts does not refer to a mental activity, but directly indicates the effect which results or fails to result " from the later fact," as *convalescere* (9, 13, 19, 22), *vitiari* (23), *confirmari* (1, 15), *mutari* (6), *fieri* (21), *crescere* (16, 17), *subici* (25). A characteristic feature of all these verbs is that they are either in passive form [25] or intransitive.

This close connection of *ex* with *post facto* on the one hand, and with a pertinent verb on the other, cannot be overlooked in accurate translation. For Roman texts, therefore, *ex post facto* cannot be rendered merely by the phrase " after the fact " as if *ex* did not exist. None of the foregoing texts admits of such a translation.[26]

From the texts analyzed it is clear that, in each case with an *ex post facto,* conclusions are drawn " from the subsequent fact " with regard to a prior legal situation. The conclusions are not equal: some are positive, others negative, in the sense that no change arose *ex post facto.* It is not our intention to enter here into a study of the " retroactivity " or " retrospective operation " of certain facts in Roman law, for our attention is limited to the term *ex post facto.* Moreover, the texts examined here cover only a portion of the cases involving

[23] Cf. *supra,* n. 9.

[24] Cf. the phrase in Dig. 49.17.20: *ex hoc quod postea contigit, ostenditur.*

[25] Therefore in some cases it was necessary to translate *ex* as " by " instead of " from ".

[26] Likewise some paraphrases in the older lexica are absolutely useless for the Roman sources, as for example, that of Du Cange: " re peracta " which is also to be found in Maigne d'Arnis, *Lexicon mediae et infimae latinitatis.* Neither does the latter's French translation " après coup " fit the juristic texts.

problems of retroactivity. What may be concluded even from this limited number of cases is that sometimes the *post factum,* whatever it was, led to a proper appreciation of an earlier legal situation, primarily one which from the beginning suffered from some uncertainty, as, for instance, when the legal situation depended upon the fulfillment of a suspensive condition, or on an active doing by a person involved, and the action which could clarify or change the situation afterwards was not performed. On the other hand, another group of texts started from the principle that a legal transaction which was void from the beginning could not become valid *ex post facto* and, vice versa, that a valid act could not become void from what happened subsequently. In no case does the locution appear in connection with a later legal enactment (*lex, constitutio, senatusconsultum*) to be referred to prior facts or criminal offenses. The unique text concerned with a personal privilege granted as an act of grace by the emperor, the *restitutio natalium* (Text 21) seems to allude to a retrospective operation of a quite exceptional nature. Even an imperial rescript declaring a man free-born, in spite of his birth in slavery, could not change the fact itself. But it did produce effects for the future, as if the man had been born in liberty, thus opening to him the possibility of being admitted to the equestrian rank or to official positions for which the status of a free-born was required.

It is now obvious why in Latin juristic sources there is not, nor can there be, any trace of the expression *ex post facto lex* or *constitutio* or anything similar. To the Roman jurist any such use would have been against his linguistic feeling and the spirit of his language. It would overthrow the clear and precise meaning of the locution *ex post facto* which was familiar to him. In a wording like *ex post facto lex* the first three words would acquire a technical juristic meaning which they did not have in his language. A *lex* deriving "from" (*ex*) would signify to him that the law was drawn out "from" a fact subsequently (to what?) done and the enigmatic *post*

factum would sound to him like the source of the law, since he would miss in the abridged phrase not only the pertinent verb indicating a conclusion or an effect from a fact but also the previous occurrence or legal situation to which the *post* alluded. An elliptical expression which leaves more unsaid than it really says, one which combines a former event with a later law to be referred to it, lies beyond the Roman juristic terminology. A Roman jurist would never have said *ex post facto* when he meant *in* (*ad*) *ante facta.* To him the opposite of *in post facta* would have been *in ante facta.* And what would be the antonym of *ex post facto lex?* An *ex ante facto lex* makes no sense in the Roman juristic language.

With the adverbs *ante* and *post* (*postea*) and the adjectives *praeteritus* and *futurus,* the Roman jurists could cover all situations connected with the problem of the retroactivity of laws. This problem was not unfamiliar to them. From Gellius, *N. Att.* 17.7.3, we learn that it was discussed as early as the end of the second century B.C. by three famous republican jurists, P. Mucius Scaevola, Brutus, and M' Manilius, renowned as the men who *fundaverunt ius civile.*[27] They debated the meaning of the words *quod subruptum erit* in the *Lex Atinia* (about 150 B.C.), concerned with the *usucapio* of things stolen.[28] They were primarily interested in the question whether the statute should be applied only to future thefts or also to those committed in the past:

> . . . quaesisse ait dubitasseque utrumne in post facta modo furta lex valeret an etiam in ante facta, quoniam ' subruptum erit ' utrumque tempus videretur ostendere, tam praeteritum quam futurum.[29]

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[27] Cf. Pomponius, Dig. 1.2.2.3; Berger in Pauly-Wissowa, *Real-Enzykl.,* XII, 2331-2.

[28] For this statute see Berger, *loc. cit.;* De Visscher, *Revue historique de droit français et étranger,* XVI (1937), 575ff.

[29] There is no need here to enter into a discussion of the meaning of the part which follows in Gellius' quotation from this statute (*aeterna auctoritas*). The translation given in Rolfe's edition (Loeb Cl. Libr.) III, 227, is unacceptable.—Cf also Cicero, *In Verrem* II, 1.42.109: *ante acta—post legem.*

The answer, subsequently supported by the grammarian P. Nigidius,[30] was in favor of the retrospective operation of the statute. A *lex quae valet in ante facta* (*furta*) could never be called by a Roman jurist an *ex post facto lex.*

A *lex* has to be applied *in facta,*[31] and not *ex facto,* as shown by a quotation from Tacitus, *Ann.* 3.69, relating an utterance made by Tiberius: *ideo leges in facta constitui quia futura in incerto sint.* Laws refer to facts (crimes) actually done, since it is uncertain whether facts to be done in the future will ever be done.[32]

Equally clear is the language of imperial constitutions, of which we may cite a few examples from the later Empire, covering a period of more than two centuries, the fourth to the sixth. In spite of the fact that their language is no longer that of the Roman classical jurists, they are linguistically instructive no less than the earlier literary and juristic passages we have quoted. They all deal with retroactivity in the fields of both criminal and private law.

When Constantine, Cod. Just. 8.34(35).3.1 (a. 326) forbade the so-called *lex commissoria* over a pledge—an agreement by which the creditor became owner of the pledge if the debt was not paid on the date fixed—he not only did so with regard to such agreements to be made in the future, but he also annulled all agreements of the kind that had been concluded previously and were still binding: *quae* [*sc. sanctio*] *cum praeteritis praesentia quoque depellit et futura prohibet.*

In 440 the Emperors Theodosius II and Valentinian III established a norm which, accepted afterwards by Justinian in his Code, 5.14.7, acquired a fundamental importance in his law:

30 Cf. Kroll in Pauly-Wissowa, *Real-Enzykl.,* XVII, 200.

31 In a text quoted below (*Cod. Just.,* 5.14.7) we read *ad facta.*

32 This is the meaning of the saying, and not what the unfortunate version given in the edition of the *Annals* by J. Jackson (Loeb. Cl. Libr., 1931), 631, says: "The reason why laws were made retrospective [!] towards the thing done was that things to be were indeterminable."—Cf. *Cod. Just.,* 10.32.66 (65). 1, quoted below.

> Leges et constitutiones futuris certum est dare formam negotiis, non *ad facta praeterita* revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit.
>
> (It is certain that statutes and [imperial] constitutions settle rules for future transactions and canot be recalled to past facts, unless it is expressly provided that they apply to the past and to transactions still pending.)

The limpid text needs no commentary. Again the juxtaposition of *praeterita* and *futura,* and *ad facta revocari* could just as well have been written by a classical jurist.

Some sixty years later, the Emperor Anastasius, referring to a constitution of his predecessor Zenon on the liability of government officials, stressed that it was valid from the day of its promulgation, and repeated the principle (Cod. Just. 10.32.66[65].1,i.f.; a. 497-499) . . . *conveniat leges futuris regulas imponere, non praeteritis calumnias excitare.*

Finally, two constitutions by Justinian deserve to be taken into consideration. Following the principle expressed in the constitution of Theodosius and Valentinian quoted above, Justinian applies it to his recent law (Cod. Just. 4.32.26.2; a. 528) by which the maximum rate of interest was fixed. He says (Cod. Just. eod. 27; a. 529): higher interests stipulated previously to that law (*ante eandem sanctionem*) are actionable only for the time that had elapsed before its promulgation (*quod ante eandem fluxit legem*), whereas for the time subsequent to the promulgation (*ex tempore lationis*) the rates must be reduced according to the limits fixed in the pertinent law.[33]

In his constitution of 534 on vacant inheritances (*de caducis tollendis,* Cod. Just. 6.51.1.15) Justinian expressly ordered that the law have application only to those last wills which would be made after the publication of the law (*in his de-*

[33] " . . . iubemus eos qui ante eandem sanctionem ampliores quam statutae sunt usuras stipulati sunt, ad modum eadem sanctione taxatum ex tempore lationis eius suas moderari actiones, illius scilicet temporis, quod ante eandem fluxit legem, pro tenore stipulationis usuras exacturos."

functorum elogiis quae posthac compositae sunt). Prior cases (*anteriores casus*), however, had to take their normal course according to earlier rules.

III.

Here the Romanist must end his reflections. He dislikes entering a less familiar field and risking the charge of being a *sutor supra crepidam*. But a few concluding remarks are perhaps in order.

It is evident that the Roman *ex post facto* and the modern technical term, "ex post facto law," essentially have very little in common. Attempts to find a bridge to cross over the intervening eleven or twelve centuries[34] have been futile, although the Latin portion of the modern phrase doubtless grew on Roman ground. It is unlikely that such a rare Latin grammatical structure, which in antiquity seems to have been used only in juristic texts, could have been invented by a medieval or post-medieval jurist.[35] Some one—certainly a legal writer—who knew it from Roman legal sources coined the term "ex post facto law." I, for one, have been unable to discover the unknown author.[36] But he may have had only a vague idea of the real meaning of those words in Roman sources; he was perhaps misled by the fact that the texts in which they occurred were somehow not deprived of an element of retroactivity. Thus he created the term "ex post facto law" as a technical one, apparently guided by the tendency to form a brief, elliptical denomination which he conceived as equivalent to "a law passed after a fact to which it

[34] The earliest example given in the *Oxford Dictionary* from a work of Bishop Hall (1689)—an *ex post facto* partaking in a theft—is still very far from an *ex post facto* law.

[35] I do not know why the *Oxford Dictionary* calls *ex post facto* a "medieval Latin phrase."

[36] The only reference I found to Roman legal sources was not encouraging: G. W. Paschal, *The Constitution of the United States* (1876), 392, writes as follows: "It was used in Justinian's [*sic*] time as a quaint [?] phrase just as in *ca.sa.*, or writ, or *in the pone* or *quo minus* is used at the present time."

was to be applied." He disregarded the disturbing preposition *ex* which hardly fits into the picture; he did not hesitate to keep the adverb *post* where *not the fact, but the law was posterior.* Moreover, through a radical ellipsis, he left out all allusion to the retroactivity of what he called "ex post facto law," to wit, its application to prior conduct or events, and especially in criminal matters, to conduct not punishable under the laws which existed when the conduct occurred. There is no trace of all this in the four words "ex post facto law," although their author might have had it in mind. He preferred a not appropriate Latin expression to a clear, congruous English one. But he won, and that is decisive.

At the time when the Constitution of the United States was written, the term was generally accepted. Many certainly knew what it meant. Otherwise it would have been impossible to use it in a document of such importance. As a matter of fact, the Declarations of Rights of the Convention of Maryland (art. 15) and of North Carolina (art. 24) already contained the formula: "No *ex post facto* laws ought to be made." Both those formulas were preceded, however, by the general statement: "Retrospective laws punishing facts committed before the existence of such laws and by them only declared criminal are oppressive, unjust and uncompatible with liberty; therefore no *ex post facto* laws . . . ." The Constitution does not contain this introductory statement; merely the prohibition itself was repeated: "No *ex post facto* law shall be passed" (Art. 1, sect. 9, 3) and with regard to the States (Art. 1, sect. 10, 1): "No State shall . . . pass . . . any *ex post facto* law." And thus the term obtained high authority, although different views had been expressed during the debates as to its extent.[37] Some doubts in this respect remained, however, and had to be solved by a long series of

[37] Cf. G. T. Curtis, *History of the Origin . . . of the Constitution,* II, 360. The term was given preference to "retrospective"; cf. "Documentary History of the Constitution," *Bulletin of the Bureau of Rolls and Library of the Department of State,* No. 9 (1897), 631. Cf. *ibid.,* pp. 636, 747.

decisions.[38] As late as 1798 Justice Chase of the Supreme Court said: ". . . the words, '*ex post facto law*,' . . . have not any certain meaning attached to them." ". . . for, naked and without explanation, it [the prohibition] is unintelligible, and means nothing. Literally, it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed." [39]

Nowadays there is no longer any question about the basic meaning of the term " ex post facto law." It belongs exclusively to the fundamental stock of the Anglo-American legal vocabulary.[40] Not one constitution of Latin America adopted the term.[41] The reason and origin of this Anglo-Latin com-

[38] Cf. Cockroft, Garland, McGhee, *The American and English Encyclopaedia of Law* (2nd ed., 1899), XII, 525ff.; Cooley-Carrington, *Treatise on Constitutional Limitations* (8th ed., 1927), 543. See also the recent paper of Crosskey, " The True Meaning of the Constitutional Prohibition of Ex-Post-Facto-Laws, *Chicago Law Review,* XIV (1947), 539ff.

[39] *Calder* v. *Bull,* 3 Dallas 386. The quoted passages occur at pp. 395 and 390 respectively.

[40] Translations of the Constitution of the United States into foreign languages avoid using the Latin part of the term; thus, a Spanish version (Pasquel, *Las constituciones de America,* I [1943], 462, 463) speaks of *ley retroactiva* or *ley que tenga efecto retroactivo;* a French one (Mirkine-Guetzévitch, *Les constitutions des nations américaines* [1932], 237), of *lois rétroactives;* a German one (Freund, *Das öffentliche Recht der Vereinigten Staaten* [1911], 43, 342), of *rückwirkende Gesetze.* In the American literature there is, however, a tendency for making a distinction between retroactive (retrospective) and ex post facto laws. Cf. Black, *Law Dictionary,* under " Ex post facto laws."

[41] As a matter of fact, Latin American constitutions do not formulate prohibitions against passing retroactive laws, but exclude retroactive application of laws in general or of penal laws in particular. This they express either by declaring applicable only laws that were promulgated before the deeds to be prosecuted, *ley promulgada antes del* (or *anterior, preexistente al*) *hecho* (cf. the Constitutions of Argentina, 1853, art. 18; Chile, 1925, art. 11; Costa Rica, 1871, 1927, art. 43; Cuba, 1940, art. 28; Ecuador, 1939, art. 26, 10; Guatemala, 1935, art. 30; Peru, 1933, art. 57), or by denying the retroactive effect of laws (Bolivia, 1938, art. 31: *La ley solo dispose para lo venidero y no tiene efecto retroactivo;* Cuba, 1940, art. 22; Haiti, 1918, art. 12; Honduras, 1936, art. 54; Nicaragua, 1939, art. 43; Panama, 1941, art. 29; Paraguay, 1940, art. 26; El Salvador, 1939, art. 42; Venezuela, 1936, art. 32, 17b). Some of these consti-

bination in which the Latin element, although larger in quantity, has been absorbed by the single word "law" so as to become, as it were, an English term, have never provoked any particular interest. And yet, the roots of *ex post facto* lie in Roman juristic soil, even if the way back to the Roman origins does not run straight because of a deviation, conscious or unconscious, which turned the phrase aside from its real source and gave it another direction of development.[42]

The classical Latin expression and its original meaning have fallen into oblivion. Recalling them has been the purpose of these remarks.

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tutions (Cuba, Honduras, El Salvador, as cited; Panama, art. 34) expressly grant retroactivity to penal laws when they are in favor of the delinquent. The Constitution of Colombia (1936) deserves particular mention. First, art. 22 formulates the general principle in the same way as the constitutions mentioned above: no one may be sentenced except under a law prior (*preexistente*) to the act committed. Laws subsequent to the fact can be applied in criminal matters when they are more favorable to the accused. Then art. 24 (already found in the Constitution of 1886-1930, art. 28) says: even in time of war nobody can be punished *ex post facto* (*aun en tiempo de guerra nadie podra ser penado expost* [sic] *facto*), but only according to the law, order, or decree by which the act shall have been previously prohibited (*en que previamente se haya prohibido el hecho*) and the punishment fixed for its perpetration. This is, however, a mere repetition of the principle expressed in art. 22, but with the attachment of *ex post facto* to the verb "to punish," and its extension to apply "even" in time of war. It is at least striking that the phrase *ex post facto* was not used in art. 22, but awkwardly connected with punishing in art. 24, as if there could be a punishment *ex ante facto*.— The constitution of Puerto Rico (1917) repeats the prohibition of the Constitution of the United States in art. 2: *No se aprobarà ninguna ley "ex post facto."*

[42] During the discussion on "ex post facto laws" in connection with the Nuremberg trials of the German war criminals, new-fashioned expressions were coined with *ex post facto*, as for instance, "ex post facto punishment" (cf. the foregoing note with regard to the Constitution of Colombia) or "ex post facto (=retroactive) effect (!) given to the law."

CONCERNING THE TRANSMISSION OF JULIAN'S DIGESTA

IN the last twenty years the suspicion that Julian's *digesta* did not reach the age of Justinian in their original form has been voiced by several authors with increasing confidence. The first utterance to this effect was, as far as I can see, a cautious remark by B. Kübler.[1] Shortly afterwards F. Pringsheim[2] considered the possibility that the work may have been known to the compilers in a postclassical edition containing glosses and paraphrases, and A. Steinwenter[3] made very probable the pre-Justinian interpolation of *Dig.* 1.3.32.1.[4] In 1938, S. Solazzi[5] arrived at the conclusion that the classical work had been re-issued by a postclassical editor who worked into the text Greek marginal glosses. Most recently A. d'Ors Pérez-Peix spoke of "the postclassical editor of the *digesta* of Julian",[6] and F. Schulz stated that "the text available to the compilers was already deeply interpolated."[7]

There are two well-known passages in the Digest, one by Julian and one by Ulpian, which, it seems to me, in their consonance prove the existence of a postclassical revised edition of Julian's work.

Dig. 13.6.19, Jul. 1 *dig.:*

> Ad eos qui servandum aliquid conducunt aut utendum accipiunt damnum iniuria ab alio datum non pertinere procul

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[1] *Krit. Vierteljahrsschrift f. Gesetzgeb. u. Rechtswiss.* XXXIII (1929) 191.

[2] *Z. Sav. St.* L (1930) 421.

[3] *Studi in onore di P. Bonfante* (Milan 1930) II 421ff.; especially, 437f.

[4] See also H. J. Wolff, *Studi in onore di S. Riccobono* (Palermo 1935) III 465, as to *Dig.* 35.2.87.4,5,8.

[5] *Studi di storia e diritto in onore di E. Besta* (Naples 1938) I 17ff.

[6] *Anuario de Historia del Derecho Español* XVI (1945) 260.

[7] *History of Roman Legal Science* (Oxford 1946) 230; see also note EE on p. 342.

dubio est: qua enim cura aut diligentia consequi possumus, ne aliquis damnum nobis iniuria det?

Dig. 19.2.41, Ulp. 5 *ed.*:

Sed de damno ab alio dato agi cum eo non posse Iulianus ait: qua enim custodia consequi potuit, ne damnum iniuria ab alio dari possit? sed Marcellus interdum esse posse ait, sive custodiri potuit, ne damnum daretur, sive ipse custos damnum dedit: quae sententia Marcelli probanda est.

It is obvious that neither passage renders the exact words of the classical jurist to whom it is ascribed, and both have been subject to much criticism.[8] The most radical of the critics was, as usual, G. Beseler,[9] who replaced Ulpian's text by one of his own making [10] and even believed that the compilers, without consulting Julian's work, made up the present texts by way of paraphrasing Ulpian's words. Leaving aside for a moment the question of the contents of the passages, it can be stated that the latter assumption is not acceptable. Apart from the circumstance that it remains a mystery why the compilers should have proceeded in such a way, Beseler's hypothesis is excluded by the fact that the excerpt from Julian belongs to the Sabinus mass, while that from Ulpian

[8] See *Index Interpolationum ad loca* (*tom.* I [Weimar 1929] 216, 364). Only part of the literature named there was available to me. In particular, I did not have direct access to the following: the two articles by F. Schulz in (*Grünhuts*) *Zeitschr. f. d. priv. u. öffentl. Recht der Gegenwart* XXXVIII (1911) und in *Krit. Vierteljahrsschr.* L (1912); F. Haymann's article in *Z. Sav. St.* XL (1919); J. Važny's article in *Ann. del Semin. Giur. della R. Univ. di Palermo* XII (1926); V. Arangio-Ruiz, *La responsabilità contrattuale in diritto romano* (Naples 1927); J. Paris, *La responsabilité de la custodia en droit romain* (Paris 1926). A. Guarino, *Salvius Iulianus* (Catania 1946) was also inaccessible.

[9] *Z. Sav. St.* L (1930) 54.

[10] "Cum eo, qui aliquid conduxit aut utendum accepit, etiam propter damnum iniuria ab alio datum agi posse Iulianus libro primo digestorum ait. idem tamen adicit eum, qui servum conduxit aut utendum accepit, custodiae nomine non teneri. sed Marcellus apud eum notat eum, qui servum custodiendum conduxit, periculum eius servi praestare debere."

belongs to the Edict mass. It is impossible to believe that the plenary commission, which alone could be responsible for the interpolations, should have wasted time with faking a classical utterance (Julian) which—since they obviously approved of Marcellus' opinion—was not even in agreement with their own views. Any discussion of the two passages should, therefore, accept the evidence to the extent that both fragments had their basis in something the compilers actually read in the works indicated by the inscriptions they bear in the compilation.

This, however, was not what the two classical authorities had written.

A number of critics believe that Tribonian substituted the words *cura aut diligentia* in fr. 19 for *custodia* and that Ulpian is giving us the genuine wording of the sentence in question.[11] This is an inference from Seckel's well-known theory [12] that certain contractual relationships, including those mentioned in the two fragments, produced a liability for *custodia,* which, exceeding that for mere diligence, made the debtor responsible for theft of the object by somebody else and for all other mishaps except those due to *vis maior.* Kunkel,[13] as a matter of fact, found in the discrepancy between the two sources one of the foundations for his doctrine of the postclassical origin of the concept of *diligentia* as a technical standard of liability. It is true that his argument was refuted by W. W. Buckland,[14] who rightly pointed out that even Ulpian's words are intelligible only if *custodia* implied more than a purely objective

[11] E. Seckel in Heumann's *Handlexikon* (ninth ed.; Jena 1907) *s. v. custodia* a,ee (p. 117), and others listed in *Ind. Interpol. ad Dig.* 13.6.19; add: W. Kunkel, *Röm. Privatrecht* (Berlin 1935) 175 n. 9; G. Petropoulos, Ἱστορία καὶ εἰσηγήσεις τοῦ ῥωμαϊκοῦ δικαίου (Athens 1944) 367f. (following Schulz, *Einführung in das Studium der Digesten* [Tübingen 1916] 47); P. Krückmann, *Z. Sav. St.* LXIV (1944) 52.

[12] *Loc. cit.*

[13] *Z. Sav. St.* XLV (1925) 269f.

[14] *St. Bonfante* II 99.

standard; in other words, if it required of the bailee the conduct of a diligent man.[15] Buckland was mistaken, however, when he inferred from his objection the authenticity of both passages. It is precisely in the way he understands the two parallel sentences that he imputes to Julian something this great practitioner cannot possibly have said. It is unthinkable that the jurist was unaware of the fact that there might very well be cases in which diligent watch could prevent the infliction of damage by a third person.

This constitutes our problem. For, while for the reason just given the two sentences can hardly be classical,[16] it is, just the same, most unlikely that they were interpolated by the compilers. Their wordings are too similar to allow for the assumption that they were independently inserted by those responsible for the excerption of the respective masses. Nevertheless, the pointed contrast between *cura aut diligentia* in fr. 19 and *custodia* in fr. 41 also excludes the possibility that they were added when the final touches were put to the completed work of the Digest. They must have found their way into Julian's *digesta* and into Ulpian's *libri ad edictum* in pre-Justinian times.

How, then, did the double interpolation come about? I can think of no other occasion which during the postclassical period might have caused a simultaneous and parallel interpolation of the works of two different classical authors.

For a solution to our problem, it is necessary to determine, as far as possible, what Julian and Ulpian had really said. So far as I can see, Julian's decision has almost unanimously been taken for what it seems to be, if we accept the passages at face value; that is to say, it is taken for granted that Julian peremptorily excluded responsibility for Aquilian damage from the liability for *custodia*. But we have observed that

[15] See also Krückmann, *op. cit.* 5 and *passim*.

[16] Both sentences were already eliminated by Haymann, *Z. Sav. St.* XL (1919) 194ff.; H. Siber, *Röm. Recht* (Berlin 1928) 245 n. 18, 19; Steinwenter, *St. Bonfante* II 427 n. 24.

this would be strange indeed, if Buckland and others are right in including in the definition of *custodia* a certain conduct to be required of the person liable. We may add that it would be no less strange from the standpoint of a purely objective concept of *custodia,* since all cases of Aquilian damage can by no means be classified as *vis maior.*[17] A way out might be the assumption that Julian denied liability for *custodia,* because, in contrast with the *actio furti,* the *actio legis Aquiliae* belonged to the owner exclusively (*Dig.* 9.2.11.6, 9).[18] To argue in such a way, however, would mean to reverse the reasoning of the Roman jurists. In the view of the classical authorities, including Julian (*Dig.* 47.2.14.10), the right of the *commodatarius* etc. to bring the action of theft was a consequence of his liability for *custodia,* not vice versa, and we have no reason to suspect that they argued the other way round when it was a case of the *lex Aquilia.* As a matter of fact, at least Ulpian took it for granted that the *commodatarius* was responsible, even though he could not himself sue under the *lex Aquilia* (*Dig.* 13.6.7.1).[19] We also ought to take into account the

[17] Cf. Haymann, *op. cit.* 197, who has Julian decide in the opposite sense by substituting <*semper*> for [*non*]; see also Beseler, *loc. cit.* (see n. 10, *supra*).

[18] This was a consequence of the mentioning of the *erus* in the *lex Aquilia;* see E. Carrelli, *Rivista del diritto della navigazione* IV (1938), p. 6f. of the reprint; H. F. Jolowicz, *Digest XLVII.2 de furtis* (Cambridge 1940) p. xxxv.

[19] Source materials do not admit of a secure answer to the question of how the bailee could make good his claim for indemnity against him who had committed the tort. Debry, *Nouv. Revue historique de droit français et étranger* XXXIII (1909) 664 n. 1, believed in an *actio utilis legis Aquiliae;* Važny, *Ann. Palermo* XII (1926) 108, asserted that the bailee could compel the bailor *in iure* to assign the *act. leg. Aqu.;* see also Arangio-Ruiz, *Respons. contratt.* 165 (all these not seen; cited after Carrelli, *op. cit.* 10 n. 1, 16 n. 1). Carrelli himself is opposed to both Debry and Važny; see p. 10 n. 1. He believes that the *nauta,* but only the *nauta,* could avail himself of an *actio utilis leg. Aqu.* This right of the shipmaster may have existed, in view of Paul. *Dig.* 4.9.6.1 (see Carrelli, p. 18ff.), although Carrelli's treatment (p. 11ff.) of Gai. *Dig.* 4.9.5.1 does not seem convincing: I discount the fact that the paragraph may be a mere explanatory gloss (see n. 25, *infra*); but Carrelli also disregards the fact that Gaius was dealing only with the question of the

nota of Marcellus which indicates that Julian did infer his decision from the principle of *custodia.* It is certainly true that fr. 41 does not render the correct wording of either the *nota* itself or of Ulpian's report on it,[20] and it may be that Ulp. 5 *ed. Dig.* 50.16.9, "Marcellus apud Iulianum notat verbo 'perisse' et scissum et fractum contineri [et vi raptum]," [21] was taken from the same *nota.*[22] But these facts do not warrant the conclusion, at one time drawn by Schulz,[23] that in *Dig.* 19.2.41 the compilers replaced the true *nota,* as preserved in *Dig.* 50.16.9, by an invention of their own with entirely different contents. If the two quotations belong together, they concern different parts of Marcellus's *nota.*

The resulting suspicion that the information which the two passages supply about Julian's attitude is not fully reliable

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responsibility of the *nauta,* to be realized in the *iudicium recepti* (see O. Lenel, *Paling. Iur. Civ.* [Leipzig 1889] I p. 198), and had no reason to discuss the realization of the captain's claim for indemnity against the Aquilian culprit. If Carrelli's theory is correct for the *nauta,* I can, in spite of the silence of the sources, see no reason why the *commodatarius* etc. should be treated differently; perhaps Debry was right, despite Carrelli p. 10 n. 1, in referring *Dig.* 9.2.11.9 to the *act. directa* only. Generally speaking, the hypothesis of an *act. utilis* seems more satisfactory than that of a *cessio actionis,* since the latter would have left the bailee unprotected when the bailor was not the owner of the object. I should also like to stress the fact that the restriction of the *act. leg. Aqu.* was, after all, a purely formalistic conclusion from the way the *lex,* containing the word *erus,* was drafted, but not an effect of any compelling juristic principle. At least, this was so in the classical period when one of the differences between *furtum* and the Aquilian tort was no longer felt as deeply as perhaps it had been felt in the old days when the *lex Aquilia* was enacted; at that time, the *act. furti* avenged in part the breaking into the *house* of the plaintiff (who did not have to be the owner of the thing carried away), while the *act. leg. Aqu.* concerned the killing or damaging of *personal* property. The classical jurists made the *interest* the criterion for the legitimation to bring the *actio furti* and might have done the same for the *actio leg. Aqu.,* if the express text of the *lex* had not prevented them; see also Jolowicz, *loc. cit.*

[20] Schulz, *Grünhut's Zeitschr.* XXXVIII (1911) 36f., *Einführ. i. d. Stud. d. Dig.* 47f. S. Brassloff, *St. Riccobono* I 318 n. 1, holds fr. 41 to be genuine.

[21] For the interpolation see H. Niedermeyer, *St. Bonfante* II 404 n. 82.

[22] Schulz, *locc. citt.*

[23] *Locc. citt.*

can be further substantiated. What we learn about their original settings admits of no inference as to their original contents, except that Julian, and likewise Ulpian, was not dealing *ex professo* with either the *lex Aquilia* or *commodatum* or *locatio conductio*. His subject was some matter of procedure, perhaps some unknown clause in the praetorian edict.[24] This fact, to my mind, excludes the possibility that Julian here made any general statement concerning the liability of *conductor* or *commodatarius*. He must have dwelt on some specific problem, brought forward to illustrate the procedural point in question, and must have said that *in his case* the liability for *custodia* of the *conductor* or *commodatarius* did not make him responsible for the Aquilian damage caused by somebody else. What Julian's case was we cannot even guess, although several possible answers to the question can be thought of. The object of the contract may have been an adult slave who was not subject to constant watch. More likely, in the light of the second sentence and of the *nota Marcelli*, the classical jurist had in mind a case in which even the most careful watch could not have prevented the damage, such as faulty medical treatment of a slave or a contingency of the nature of those discussed in Gai. *Dig.* 9.2.8.1 or in Ulp. *Dig.* 9.2.9.4; 11pr. Whatever it may have been, Julian had no reason at this place to examine all the possible implications of the liability for *custodia*. In a reader who did not thoroughly think through the situation this may have caused the impression that the jurist simply denied liability in any case involving Aquilian damage, an impression which may have seemed to be confirmed by the circumstance that Marcellus—who, in fact, probably did not oppose but rather elaborate on Julian's statement—apparently commented on it to the effect that there were cases in which the liability did apply.[25]

[24] See Lenel, *Edict. Perpet.* (third ed.; Leipzig 1927) 74f. See also H. H. Pflüger, *Z. Sav. St.* LXV (1947) 203.

[25] No objection to this interpretation can arise, in my opinion, from Gai. 5 *ed. prov. Dig.* 4.9.5.1. Even if the poorly drafted paragraph—note the

Ulpian's opening sentence, which has been generally (except for Beseler) and rightly been considered genuine, is compatible with this result. It derives its sweeping character only from its connection with the brief excerpt from Gai. 5 *ed. prov.* (*Dig.* 19.2.40: "Qui mercedem accipit pro custodia alicuius rei, is huius periculum custodiae praestat"), with which the compilers combined it. In its original surroundings, it was the final sentence of Ulpian's report on what Julian had actually said. Julian's own statement has reached us only in a postclassical and partly distorted form. But in this form it was read by the man who added the *qua enim*-sentence to the text of Ulpian which has come to us as *Dig.* 19.2.41. The same person further added a paraphrase of Marcellus's *nota.*

This hypothesis about the relationship between *Dig.* 13.6.19 and 19.2.41 receives support from some facts which I feel able to state with respect to the textual history of Ulpian's commentary on the Edict. In a paper [26] shortly to be published in the volume which is being prepared to honor Fritz Schulz, I expect to show, by an analysis of *Frg. Vat.* 75-88 (from the seventeenth book of Ulpian's *libri ad Sabinum*), that in early postclassical times, presumably under Diocletian, the *libri ad Sabinum* were provided with a continuous chain of marginal comments made by a man who systematically compared the writings of Julian cited by Ulpian and drew from them further materials suitable to illustrate points made by Ulpian. These comments, which had the form of paraphrases rather than of literal quotations, were included in a revised and enlarged

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unqualified *de* (*a*) *damno,* instead of *damno iniuria ab aliquo dato*—is genuine, there is no need to understand it to the effect that only *is qui salvum fore recipit,* but no other person liable for *custodia,* should be responsible for Aquilian damage inflicted by a third person. The pointed analogy, drawn in the *pr.,* between *nauta* etc. and *fullo et sarcinator* in fact speaks for the contrary. I do consider the possibility that the unconditional wording of the edict (*Dig.* 4.9.1pr.) had the effect of making the liability of *nautae* etc. more severe than that of other debtors responsible for *custodia* (see also n. 40, *infra*). But this cannot have meant more than that no such allowances as indicated above were made for debtors falling under that edict.

[26] *Zur Ueberlieferungsgeschichte von Ulpians libri ad Sabinum.*

edition of Ulpian's commentary that was put out soon after this series of scholia—and probably a second one, drawn in a similar manner from Neratius, Pomponius, and Papinian—had been composed.[27] Moreover: there is reason to believe that the same expert on Julian was active also on the *libri ad edictum* and other works of Ulpian's[28] and that shortly after 300 A.D. the *libri ad edictum* were, like the *libri ad Sabinum*, republished in a revised edition.[29]

It will hardly be too daring to identify the early post-classical expert on Julian with the author of the spurious part of *Dig.* 19.2.41 (*qua enim rell.*).[30] If this is correct, the conclusion that already Ulpian's scholiast read Julian's alleged passage in practically the same form as we have it in the Pandects follows of necessity. There is one seeming obstacle to this inference, namely, the words *cura aut diligentia* in fr. 19. But it is easily removed. For it can be stated almost with certainty—to this extent we can agree with the authorities cited in note 11, *supra*—that fr. 19 as actually written had *custodia;* nothing else is conceivable in view of the logical cohesion of the parallel sentence in fr. 41 (which, in turn, was borrowed from fr. 19) with the *nota Marcelli* further cited there. The words *cura aut diligentia* are evidently of later origin, although they were hardly written by the compilers in a planned drive to replace an objective standard of *custodia* by a subjective standard; had this been the case, then Tribonian would have changed fr. 41, too. I suggest that the words were an explanatory marginal gloss found by the compilers in their copy of Julian's *digesta* and substituted by them for *custodia.* From the point of view of the compilers, who of course did adhere to subjective standards, the gloss ex-

[27] Most likely the *editio repetitae praelectionis* mentioned in *const. Cordi* 3.

[28] See note 84 of my forementioned article. For the evidence for the statements made above I must refer the reader to this paper.

[29] See my paper in the forthcoming fourth volume of the *Scritti in onore di C. Ferrini pubblicati in occasione della sua beatificazione* (Milan).

[30] *Quae sententia Marcelli probanda est* could be Tribonian.

pressed the idea more clearly than the rather vague term *custodia.*

The early origin of the first sentence of fr. 19, though not copied by Ulpian's scholiast, is evident from its close connection with the second. The whole fragment such as we read it was written in one piece.

An examination of the wording of fr. 19 will confirm our hypothesis about its origin in the early postclassical period. The phrase *damnum pertinet* occurs several times in the Digest. There is, however, beside our fr. 19, only one instance where *damnum* implies, somewhat loosely, " liability for damage " rather than the normal meaning of " damage " or " risk ".[31] This is the final sentence (*ideo rell.*) of Ulp. 36 *ed. Dig.* 27.8.1.6. The sentence is not only, as was already pointed out by Beseler,[32] spurious, but—in that it merely elaborates on the idea expressed by the classical jurist—it is also a typical specimen of the method of those men who, about 300 A.D., wrote the marginal comments which found their way into the postclassical edition of Ulpian's work.[33] It is worth mentioning that the only instance in the imperial sources of *damnum pertinet,* with *damnum* likewise having the connotation of " liability for damage ", is a constitution of 294 A.D., *Cod. Just.* 4.8.2.[34]

[31] Javol. *Dig.* 24.1.50.1; Scaev. *Dig.* 40.5.41.7; Pap. *Dig.* 21.2.66.2; Ulp. *Dig.* 13.6.5.7; 49.4.1.11; Paul. *Dig.* 22.2.6pr.; Mod. *Dig.* 26.7.32.1.

[32] *Beiträge zur Kritik der römischen Rechtsquellen* II (Tübingen 1911) 27. Supplementing Beseler's argument, I wish to call attention to the obscure expression *medio tempore.* Does it refer to the period between the time when the appointment of a *tutor* was applied for and the time of the action or does it merely refer to a delay of the magistrate in making the appointment? The latter would be inconsistent with the case as presented by Ulpian: *si omnino tutor . . . datus non sit.*

[33] For the character of the work of those early scholiasts see my papers cited in notes 26 and 29, *supra.*

[34] *Detrimentum pertinet* in *Cod. Just.* 4.34.1 (*Coll.* 10.8.1) belongs together with *Dig.* 13.6.5.7 rather than with the sources named above.

This may indicate that *Dig.* 13.6.19, too, was written about the time of Diocletian, although we must admit that only limited force attaches to the argument. Of greater value to us is another expression occurring in the fragment, i.e., the phrase *procul dubio est. Procul dubio,* considered with suspicion as early as sixty years ago,[35] is a frequent expression in imperial constitutions of the later postclassical period and a special favorite in Justinian's vocabulary.[36] But in this late use it almost invariably serves the purpose of putting beyond doubt a legal principle laid down or expressly preserved by the emperor in his decree.[37] *Procul dubio est,* employed in the manner of *Dig.* 13.6.19—that is to say, with a specific decision given in a preceding *acc. c. inf.* clause—is not found in constitutions which are later than Diocletian.[38] This means: While the phrase, used in the fashion just described, should be eliminated from the list of those usable as sure evidence for interpolation in the Digest,[39] it can be said with certainty that a

[35] The first to cast doubt on its use by classical writers was O. Gradenwitz, *Interpolationen in den Digesten* (Berlin 1887) 121 n. 1. For further literature see A. Guarneri Citati, *Indice delle parole etc.* (Milan 1927) 32 *s. v. dubium; St. Riccobono* I 718 *s. v. dubium.*

[36] The earliest among these late instances are *Cod. Just.* 9.49.7.3 (*Cod. Theod.* 9.42.7; 369); 2.6.7.3 (370); 1.5.3pr (*Cod. Theod.* 16.5.30pr; 396). After that we find numerous instances of the fifth and sixth centuries in both *Codices.*

[37] Examples: *Cod. Just.* 8.11.20 (439): "procul dubio iura pristina sacratissimae reddere civitati iubemus"; *Cod. Just.* 7.7.1.3 (530): "iura autem procul dubio pro suo ordine ad eum venire qui libertatem donavit." See also the phrase *illo (hoc) procul dubio observando,* often employed by Justinian: *Cod. Just.* 3.1.13.9; 3.38.12.2; 5.51.13.2; 6.58.14.7; 6.61.8.4d; 11.48.24pr.; similar *Cod. Just.* 5.13.1.6. *Cod. Just.* 2.12.12pr.: *satisdatione—subiecta* is therefore an interpolation, probably by the compilers. *Cod. Just.* 9.5.1.1 (486) concerns a question of fact.

[38] *Cod. Just.* 6.35.1.2 (204); 9.32.4.2 (242); 4.22.5 (294); 10.32.11 (294). *Cod. Just.* 3.28.7.2 (531) has *procul dubio est* with a subsequent *acc. c. inf.* clause, but the character of the statement connects the passage with those cited in the preceding note. In *Cod. Just.* 2.41.2 (531) and in *const. Summa* 3 the *acc. c. inf.* clause states the *ratio legis.*

[39] Therefore Beseler's (*Z. Sav. St.* L [1930] 53ff.) radical elimination of *procul dubio* wherever it appears in classical texts is, in my opinion, unwar-

passage which displays it and, as we did for fr. 19, has been proved spurious by other considerations, must belong to the earliest layer of elements alien to the classical work which furnished the excerpt; in other words, it should be dated in the era of Diocletian at the latest.

With this I believe that I have reached the point where it is possible to venture a hypothesis about the relationship between fr. 19 and Julian's original work. I consider the fragment as an early marginal sum which—in both its sentences—reproduced the gist of Julian's original statement, in the main correctly, but unduly generalizing its import.[40] At one time the gloss was incorporated in the text of the *digesta,* and this must have been done in the course of the preparation of a revised edition, made prior to Justinian. For it is most unlikely that the compilers used the same copy of the work as the man who over two hundred years earlier utilized the gloss for his comments on Ulpian. As a matter of fact, if our hypothesis about the origin of the words *cura aut diligentia* is correct, the copy of the revised edition which was available to Tribonian was again adorned by new marginal glosses.

This conclusion, it is true, raises more questions than it answers—questions to which a solution can be obtained only by a comprehensive analysis of all the extant fragments of Julian's *digesta.* Such an analysis would exceed the scope of this paper. But it may be permissible to give a few hints in what direction further investigations should move.

In view of the widespread editorial activities with regard to works of classical authorities, which characterizes the time about 300 A.D., and also in view of the strong interest in

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ranted. I am inclined to consider as genuine, among others: Ulp. *Dig.* 28.6.2.6; Paul. *Dig.* 29.2.73 (Beseler's rewriting of the passage deprives it of its point which lies precisely in the fact that he who raises the claim for alimentation is not acting in his capacity as heir); Mod. *Dig.* 33.10.13.

[40] This is not the place for a general discussion of the classical doctrine of contractual liabilities. It seems to me, however, that the result of the present investigation speaks against a purely objective concept of *custodia.* See also n. 25, *supra.*

Julian displayed by scholars of that period, it would not be surprising if one of them felt the urge to revise the text of the principal work of the great jurist. It is in fact quite possible that this was actually done. However, it would be rash to base such a conclusion on the evidence of fr. 19 alone. We have, on the one hand, to reckon with the possibility that all the commenting on, explaining, and summarizing of classical works in the period in question was accomplished by a small group of men close to one another in time and place and using the same copies in which the old writings were surrounded with scholia produced by themselves or their colleagues.[41] On the other hand, there is some evidence to support the hypothesis that Julian's *digesta* became again the object of scholarly interest, manifesting itself in marginal comments, in the later postclassical period—certainly a period later than the editions of Ulpian's commentaries, for which *terminus ante quem* is given by the *Fragmenta Vaticana* and the *Collatio*.

To illustrate this point I will quote two passages the pre-Justinian interpolation of which has already been suggested in the literature.

Dig. 30.86.2, Jul. 34 *dig.*:

> Cum servus legatur, [et ipsius servi] status [et omnium quae personam eius attingunt] <eius> in suspenso est. nam si legatarius reppulerit a se legatum, numquam eius fuisse videbitur: si non reppulerit, ex die aditae hereditatis eius intellegetur. [secundum hanc regulam et de iure eorum, quae per traditionem servus acceperit aut stipulatus fuerit, deque his, quae legata ei vel donata fuerunt, statuetur, ut vel heredis vel legatarii servus singula gessisse existimetur.]

Total interpolation of the second half of this paragraph was rightly claimed by Pringsheim and Scaduto,[42] and the didactic

41 As to this, cf. my paper in *Festschr. F. Schulz* (n. 26, *supra*) sect. II.

42 F. Pringsheim, *Festschr. f. O. Lenel* (Leipzig 1921) 250; *Z. Sav. St.* L (1930) 421 n. 3; F. Scaduto, *Ann. Palermo* VIII (1921) 55. L. Wenger, *Canon in den röm. Rechtsquellen und in den Papyri* (Vienna Acad. *Sitz. Ber.* CCXX

tone of the sentence confirms its characterization by Pringsheim as a pre-Justinian gloss.[43] *Statuetur,* which suggests an author who was accustomed to the *statuimus* of imperial legislators,[44] makes a late origin of the gloss probable.[45]

The same can be said of *Dig.* 12.1.20, Jul. 18 *dig.:*

> Si tibi pecuniam donassem, ut tu mihi eandem crederes, an credita fieret? dixi [in huiusmodi propositionibus non propriis verbis nos uti, nam talem contractum neque donationem esse neque pecuniam creditam]: donationem non esse, quia non ea mente pecunia daretur, ut omnimodo penes accipientem maneret: creditam non esse, quia exsolvendi causa magis daretur quam alterius obligandi. [igitur si is, qui pecuniam hac condicione accepit, ut mihi in creditum daret, acceptum dederit, non fore creditam: magis enim meum accepisse intellegi debeo.] [sed haec intellegenda sunt propter subtilitatem verborum: benignius tamen est utrumque valere.]

2; 1942) 55 n. 4, is skeptical. I consider as interpolated also the bracketed words in the first sentence; it seems to me more likely that they were added to adapt the first sentence to what was said in the gloss, rather than that the gloss commented on these words (thus Pringsheim). These words give the impression of having been patched onto a text that was already there. As for the rest, the question of authenticity of the first sentence (see *Ind. Interpol. ad loc.* [*tom.* II 239]) can be passed over here.

[43] This in spite of the fact that I consider *licet rell.* in Jul. *Dig.* 28.2.13pr. as an interpolation by the compilers. *Regula* is not the same in fr. 13pr., where it signifies a *regula iuris* in the true sense, and in fr. 86.2, where the word is used in a loose way for the specific decision given in the first sentence. Moreover, *huiusmodi sententia* and the stiff manner in which Celsus is called *Iuventius Celsus* are typical signs of the style of the compilers (cf. *Cod. Just.* 6.22.10.3; also *Cod. Just.* 2.18.24.1; 3.33.15.1; 4.5.10.1; *const. Deo auct.* 10).

[44] It is true that *statuere* may express the pronouncement of the judge even in constitutions of emperors of the third century and of Diocletian (see, for instance, *Cod. Just.* 5.51.2; 7.19.1; 3.13.3; 6.44.5; 7.48.3). But it seems to me that the author of the sentence under examination was thinking of a general principle which could appear in an imperial statute rather than of a decision to be handed down in an individual case. Cf., in general, authors listed by Guarneri Citati, *Indice s. v. statuere* (p. 83).

[45] We may perhaps also refer to *attingere* which is a typical expression of the late period (see the instances given by R. Mayr, *Vocabularium*). But it is possible that the adaptation of the first sentence to the second was the work of the compilers.

Schulz [46] has pointed out that only *sed haec rell.* belongs to Tribonian, so that any spurious parts [47] preceding this sentence must be pre-Justinian. Again I believe that a linguistic observation indicates a late origin at least of the gloss *igitur—debeo.* The *Codices* show that *intellegere* was a popular word among legal writers of the late period. Especially, *intellegi* connected with *debet* or *oportet* occurs only in a context which is evidently a scholarly comment on a decision by Diocletian (*Cod. Just.* 4.32.19.1) and in a few imperial statutes of very late date.[48] It may be doubtful whether the phrase is in itself a sign of interpolation; but when occurring in a passage otherwise characterized as an interpolation it most probably indicates a late layer.

The observation just made with respect to *intellegi debeo* tallies with the fact that *statuimus,* too, although occasionally found earlier,[49] occurs with increasing frequency in imperial constitutions from the middle of the fifth century on.[50] We may add a reference to Schulz's observation [51] that *dicet aliquis rell.* in *Dig.* 35.2.87.7 (Jul. 61 *dig.*) " is thoroughly in the style of the *Autun Commentary,*" probably likewise of the fifth century.[52] If, as I suspect—but the question requires further investigation—the passages mentioned and others as well formed all part of one systematic didactic commentary

[46] *Rom. Leg. Sci.* 342 (note EE).

[47] See *Ind. Interpol. ad loc.* (*tom.* I 161f., *suppl.* I 179).

[48] *Nov. Marc.* 4pr. (*Cod. Just.* 1.14.9) of 454; *Cod. Just.* 5.13.1.15 (530); 6.38.5.3 (532).

[49] The earliest instances are: *Cod. Theod.* 8.12.5 (*Cod. Just.* 8.53.27pr.; 333) and 11.6.8 (*Cod. Just.* 10.48.8.1; 357); then again several times in the periods of Theodosius I and II.

[50] *Cod. Just.* 5.5.7.1 (454); 1.3.25.2 (456); often under Leo and Zeno: *Cod. Just.* 8.52.3 (469); 1.2.14.3 (470); 1.18.13; 2.7.15.1; 6.61.4.2; 10.49.3 (all of 472); 12.25.4.4 (474); 12.1.17.2 (485-486); 12.19.12.1 (undated). There is also a good number of Justinian instances.

[51] *Loc. cit.*

[52] Schulz, *op. cit.* 301, 324f.

on Julian's *digesta,* we are probably entitled to consider this commentary as a work of the latter part of the fifth century.[53]

We may probably infer from *Dig.* 12.1.20 that the comments of the fifth century were incorporated in the compilers' copy of the *digesta.* Was this done in the same edition which also took care of earlier scholia or do we have to distinguish between an early postclassical edition and a late postclassical edition, the latter possibly being based on the former? In view of Solazzi's discovery (see note 5, *supra*), the latter assumption would be almost imperative, if further research should produce the result that the scholiast of the fifth century was actually a westerner (see note 53, *supra*).[54]

Another task for future research will be the determination of the principles employed by the postclassical editor who brought the marginal sum preserved in *Dig.* 13.6.19 into the text. In particular, it is for the moment impossible to say whether he substituted the gloss for Julian's own exposition of his case or merely added it after having copied the original in full. The latter alternative is by no means out of the question, in view of the fact that the editor of Ulpian's *libri ad Sabinum* did apply this very method.[55] *Dig.* 19.2.41 allows no conclusion, no matter whether its author read Julian's work

[53] Was this scholiast responsible for the possibly eastern comments discovered by Steinwenter (but see Schulz, *op. cit.* 342 n. EE) and Solazzi (see notes 3 and 5, *supra*)? I doubt this, at least as regards the latter; see n. 77 of my paper in *Festschr. F. Schulz.* Could the similarity in style between *Dig.* 35.2.87.7 and the "Gaius" of Autun suggest a western origin of the fifth century commentary?

[54] I should like to make it clear that the above problems are independent of the existence or non-existence of pre-Justinian partial compilations used by the compilers, as suggested by Arangio-Ruiz, *Conferenze per il XIV centenario delle Pandette* (Pubbl. dell'Un. del Sacro Cuore, Sez. Sc. Giur. XXXIII; Milan 1931) 296ff. Arangio-Ruiz himself, p. 326, stresses the fact that Julian's *digesta* formed no part of any of the collections of excerpts assumed by him.

[55] See my paper in *Festschr. F. Schulz,* sect. II. A somewhat different pattern seems to have been followed by the editor of Ulpian's *libri ad edictum;* see *Scr. Ferrini* IV.

in the original with glosses or in a revised edition. Certainly the postclassical edition of the *digesta* was—or, for that matter, the various editions were—no mere *epitome*. The *notae* of Marcellus and others were incorporated in it,[56] although the scholiast of *Dig.* 19.2.41 may still have read Marcellus in a separate lemmatic commentary[57] or in his copy of Ulpian's commentary.

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[56] Cf. Schulz, *op. cit.* 219.

[57] See Schulz, *op. cit.* 185.

Notes and Reviews

Das Altrömische Ius. Studien zur Rechtsgeschichte und Rechtsvorstellung der Römer. Von Max Kaser. Göttingen: Vandenhoeck und Rupprecht, 1949. 382 pp.

In the book under review, Max Kaser continues his well-known efforts at elucidating the early stages of Roman legal history. It is an inquiry into what may be termed the fundamental problem among those posed by his line of research. He seeks to determine the original meaning and import of the concept of *ius* and to trace its evolution and ramifications, its forms of appearance, and the methods of its realization through the archaic period of the Roman law.

Rightly rejecting the identification of periods of legal history with those of constitutional history, he extends this preparatory phase of the Roman law to the middle of the third century B.C. By that time the primitive social order of a peasant community, bound by the ties of religion and family organization, had, after a long process of gradual transformation, taken the decisive turn toward one based mainly on an urban and commercial way of life and characterized by more individualistic and rational forms of thinking. Speaking in terms of legal history, those early centuries saw the separation of the spheres of law and religion with the resulting growth of the various institutions of procedural and private law and of a secular public criminal law. Even prior to the XII Tables—correctly considered as the first act of public legislation in Rome—the law had reached the end of its primitive phase in which the decision of whether or not a claim was justified was left to the gods in the form of ordeals, or was found from case to case, as faith in the force of ordeals waned, while no firm legal principles, consciously and consistently applied, existed as yet (the period of the *Fallrecht*, as the author calls it). The decemviral legislation, which confirmed such maxims as had slowly risen from the experiences of the *Fallrecht*, put the final seal on the coming of a rational administration of justice. Claims were now enforceable through *legis actiones*, so called because the XII Tables and subsequent

legislation made them available or created them (the *legis actiones per iudicis postulationem* and *per condictionem*) for the protection of certain defined rights. Soon *fides* joined the statute as an extra-legal basis of enforceable claims in that the praetor allowed it to be a sufficient ground for a *l. a. sacramento,* even though the written law provided for no action; thus an element previously left to the exclusive protection of the gods was drawn into the sphere of protection by the state. Inasmuch as *fides* was the sole regulating factor in international relations, where it retained its religious character, and, presumably, was first acknowledged as a basis for enforceable claims in dealings with aliens, its recognition was the inception of what later generations called the *ius gentium.* When it gained the first place among the factors determining the progress of the law, and when, accordingly, the praetor obtained control over the further development of the law, the archaic phase of the law had come to its end.

Such was, briefly, the course of the Roman law in its formative period, as set forth by Kaser in the first part of his book ("Die Entwicklung des ius-Begriffs"). Actually, this summary report does not render justice to the work done by the author. The first part is a detailed exposition of the historical processes and of the changes of approach through which what the author assumes to have been the original meaning of *ius* (p. 29: "eine von den Göttern gewährte und kundgemachte Erlaubtheit") was enlarged and transformed and extended to fields not covered by it in the beginning, such as the criminal law. The second and third parts ("Ius als Urteilsgrundlage und Urteilsinhalt" and "Die Verwirklichung des Ius") concern the practical application and effects of the concept of *ius* in a number of institutions, both procedural and substantive, of the old *ius civile.* Each of the numerous sections composing these parts is an independent article on a specific subject. The connection of these chapters with the central theme of the book is at times somewhat remote, but in their totality they unfold a colorful panorama of the early law as seen from the angle of the idea of *ius.* The fourth part ("Formalismus und sakrale Elemente im ius") discusses the interrelations of law and religion, chiefly the influence of primitive magic notions on the forms of legal acts and the roots of the role of the *pontifices* as keepers of legal forms.

Throughout, Kaser's book excels by its method. Carefully building on what is safely known, he proceeds cautiously into the realm of the hypothetical. Arguments are judiciously checked against what can be reasonably expected and against the scanty sources, the exact wording of which is never lost sight of. All of Kaser's reasoning is not of equal value, and some of his hypotheses require further examination. But it can be said that he has escaped the temptation—so great in questions of primitive law, where every statement is of necessity hypothetical—of arriving at purely fantastic conclusions. Some of his theories are original, in other cases he accepts suggestions already made in the literature, which is fully considered in spite of its immense scope and of technical difficulties hampering research under post-war conditions in Germany. All of his conclusions, however, whether new or taken over from others, are the result of renewed and independent consideration of sources and circumstances.

Since most of the chapters of the book are separate inquiries into specific and controversial problems, it is impossible, in the limits of a book review, to give a full critical account of its rich contents. The reviewer will confine himself to the discussion of one point of central importance and to a few remarks as to some detail.

According to the author, *ius*, in its original meaning, is what is permitted; a person who acts *iure* does not violate another. *Ius* is granted and protected by the gods. Its existence or non-existence is ascertained by ordeal; the author, with convincing arguments, sides with those who see in the *sacramentum* of the historical *l. a. sacr.* the remainder of a pledge by which the party offers his person to the vengeance of the deity whose assistance he claimed rashly (§ 2), and he rightly derives (p. 22) the idea of the *iustum bellum* from the ordeal character of war. But there is no *ius* of or against the gods. Therefore *ius* and *fas* are distinguished, not by the quality of the norms pertaining to either, but by the spheres to which they refer. That is to say, *ius* is what regulates human relations and can be realized by proceeding against other individuals, while *fas* concerns the superhuman world. Consequently, only a question of *ius* can give rise to a *legis actio*. On the other hand, the violation of a *ius* is not in itself an offense against the gods; it does not make the trespasser *sacer* and he will not be subject to the revenge of the

gods, which would otherwise take place automatically and without further human intervention. The most primitive way of realizing a *ius* was seizure by *manus iniectio;* if opposed, the *manus iniectio* had to be followed up by a *vindicatio,* resulting in a *l. a. sacr.,* against the person who claimed a better right or who intervened as *vindex* on behalf of another whose true or asserted liability to revenge for a tort had led to his seizure.

In the opinion of the reviewer, this exposition deserves full credit, in so far as it concerns the role and effect of *ius* in the primitive epoch. Kaser's notion of *ius,* however, does not seem to be in perfect harmony with the terminological evidence, with the result that it actually obscures the formation of certain features of the more advanced legal order such as they are convincingly set forth by the author himself.

It is hardly possible to reconcile his concept with a number of passages showing the term employed in some archaic formulas which pertain to acts of an exclusively religious import.[1] Kaser (p. 33) seeks to explain this use by pointing to the fact that in the old days, when the *sacramentum* was the only method of ascertaining the *ius,* a true claim under oath of a *ius* was *fas* at the same time, so that one might speak of *ius* even with reference to acts permitted under sacred rather than human law. But this is acceptable only in its premise, not in its conclusion. For even though, in the truthful *sacramentum, ius* and *fas* coincided in the result, *fas* still was merely the rightful invocation of divine aid, as separated from the preceding *vindicatio* which emerged as justifiable and therefore as *ius.* It is difficult to imagine that the two things should have been confused by the Romans, least of all at a time when *ius* and *fas* were not just two sets of norms but belonged to two distinct spheres of life, that of *fas* being the higher one.

Furthermore: in two of the finest sections of the book (§§ 6, 7) the author develops a plausible theory about the emergence of criminal jurisdiction (outside of the sphere of military coercion). Originally, the perpetrator of a manifest misdeed became immediately and automatically *sacer,* with the consequence that every member of the community was bound, on pain of his own *sacertas,* to kill him on sight. Criminal jurisdiction arose when this state of affairs became intolerable and the need was felt of a procedure by

[1] Sources assembled on p. 31f. Some of them will be cited in the following.

which to establish the guilt of the culprit. The occurrence of *iudicare* as a term to denote the criminal sentence is not compatible with what Kaser claims to be the meaning of *ius* in the primitive epoch, and the author is therefore compelled to infer (pp. 55, 63) that the expression had already assumed the larger connotation of "legal order." This hypothesis is not very satisfactory; the less so, since the conception of the criminal judgment as a *iudicare* can be traced back to comparatively early times (p. 54f.). What is more important, it would be very difficult, to say the least, to conceive the changes in the way of thinking through which the transition from the older notion to the newer might have been accomplished, unless *iudicare* had gone through a stage in which it expressed something it could not possibly express, linguistically speaking; namely, that the accused had acted *against* what was permissible or *ius*.

These instances, more of which could be adduced, may suffice to justify the reviewer's belief that a certain modification of Kaser's definition of *ius* is needed, if the concept is to cover all its actual occurrences in the sources and those phenomena of the early law which the author himself has proved or at least made appear very probable.

When the *contra vindicans,* on being asked, "qua ex causa vindicaveris," answers, "ius feci, sicut vindictam imposui" (Gai. 4.16), he means to say: I have exercised my rightful power, and I have manifested this [2] by imposing the *vindicta.* Likewise was the *pontifex maximus* asserting a rightful power when, in creating a Vestal, he pronounced the words: "quae ius siet sacerdotem Vestalem facere pro populo Romano Quiritium" (Gell. 1.12.4). While in phrases like these *ius* denotes the power which belongs to him who acts under such power, it means elsewhere, in a somewhat wider

[2] This must be the meaning of *sicut.* The reviewer does not believe that there is a discrepancy between question and answer (thus Kaser p. 326f., also *Eigentum und Besitz im älteren röm. Recht* [Weimar 1943] 84, and authors listed there). The *ius* itself, if understood as above, *is* the *causa* (cf. P. Noailles, *Rev. Hist. de Dr. Fr. et Étr.* XIX [1941] 44ff., P. Koschaker, *Z. Sav. St.* LXIII [1943] 468). In old times, when a duel or other ordeal brought the decision, nothing else was needed. Later, when the decision was found by rational means, the "causes" were presumably produced after the deposition of the *sacramenta,* while conservative formalism preserved the ancient word ritual. (Kaser has informed the reviewer that he, too, is now inclined toward the opinion of Noailles).

but related and probably likewise old sense, that which is due, whether seen from the side of him from whom it is due or of him to whom it is due; both ways of looking at it are found in the oath of the *pater patratus* (Liv. 1.32.10): "ius persolvere, ius adipisci."

It does not matter if some of these and other kindred formulas are of a later origin than others; for the concept of *ius* is the same in all of them. It is certainly correct that this concept belonged to the human sphere. It also may well be that its first use occurred in that procedure between individuals which was aimed at procuring a divine decision and which, within the pacified community, is in its final form, and already deprived of its religious character, known to us as the *l. a. sacr.* But the ordeal is only a method of ascertaining the truth about what a person or—in war—a people claims to be *ius*. The gods protect the *ius*, but they do not give it, and *ius* can and does exist before the ordeal[3] and in areas where there is no room for an ordeal. Therefore Kaser's definition of *ius* as what is permissible, and as such granted and revealed by the gods, seems both too abstract and too narrow. *Ius*, it seems to the reviewer, is all that a person—whether in a private or in a public capacity—or a group does or claims by way of exercising a power, provided this power is acknowledged (not granted!) and protected by the gods or, later, under a rationally conceived legal order, by the magistrate of the Roman people. This is—here we can again agree with the author (§ 12)—distant from the idea of the "subjective right" as understood by modern jurisprudence. But no less distant is it, like the closely analogous concept of δίκη,[4] from the idea of an objective permissibility.

Therefore the reviewer believes that the difference between the author's and his own views is real, in spite of occasional formulations by the author which seem to bridge the gap.[5] In the opinion

[3] Kaser p. 103: "'*Ius est*', Recht *ist* wirklich, was für den konkreten Fall *durch Urteil* festgestellt ist." This is correct, in so far as the praetor's permission to proceed with the realization of the *ius* is conditional upon the verdict (it does not matter here whether this results from an ordeal or is rendered by the magistrate himself or by a *iudex*). But actually the judgment is only the statement that the act of seizure which led to the trial *was* justified.

[4] See *Seminar* III (1945) 99.

[5] For instance, p. 31: "'ius' die von den Göttern gebilligte Befugnis zu einem Zugriffsakt gegenüber einer Person oder Sache . . ."

of the reviewer, the application of the term *ius* to matters of sacred and other public law does not represent an enlargement or alteration of the original concept but follows directly from it. In his enumeration of the functions of the *flamen dialis,* Gellius (10.15.5ff.) distinguishes between what is not *fas* and what is not *ius* for the *flamen;* the latter category refers to acts involving a dispositive power (*ignem efferre, matrimonium dirimere*). Inasmuch as the sacred law is the basis of these prohibitions, *ius* and *fas* do coincide here;[6] yet Gellius can speak of *ius,* because the taboos in question extend into the field of human power.[7] The idea of power is most evident in Gell. 13.15.4: " a minore . . . maior conlega rogari iure non potest." Quite in agreement with the common notion, the execution of a criminal or the extortion of a *multa* was a *ius* of the magistrate. Thus the *iudicare,* which had to be done by the *duumviri perduellionis* under the ancient *lex horrendi carminis* (Liv. 1.26.6), receives a precise sense. Kaser emphasizes the fact that this *iudicare* was not a real judgment, because the *duumviri,* concerned only with manifest treason, were not empowered to acquit the accused; and he correctly characterizes it as merely a formal pronunciation about the *perduellio* (pp. 54ff.). As a matter of fact, it was the formal statement of the *duumviri,* subject to *provocatio,* that they possessed the *ius* to execute the culprit. It has its exact parallel in δικάζειν, such as this was understood in the archaic Greek law.[8] It was, as Kaser himself stresses, not different from the sentence to be pronounced in a *legis actio;* for this, too, was the statement of a *ius,* that is to say, of the power to seize the object in dispute or the person of the debtor. The meaning of the *iudicare* of magistrate and *comitia* in the criminal procedure held before the latter was, regardless of procedural differences, the same as in the duumviral procedure.[9]

[6] So rightly Kaser p. 31 n. 42, following R. Orestano, *Bull. dell' Ist. di Dir. Rom.* XLVI (1939), 236.

[7] See also the *eum ius fasque esset occidi* in the *lex Valeria Horatia* (Liv. 3.55.5). It is true that here *ius* has an objective tinge. But that may be due to the formal combination *ius fasque.* It should also be taken into account that Livy does not render the original words of the *lex.* In his time there was no objection to the use of *ius* with an objective connotation.

[8] *To state the right:* Wolff, *Traditio* IV (1946) 75.

[9] *Iudicare* can be used for both the magistrate and the *comitia,* because both state the *ius.* Similarly, in Athens, δικάζειν was extended from the

Thus we gain a concept of *ius* which permits us to look at the various institutions of early Rome from a single point of view and which fits well in with the fact that the old law was developed by means of building up procedural institutions. It is also in harmony with the statutory basis of the law, which the author assumes for the time after the decemviral legislation[10] but before the *fides* entered the scene as a foundation of enforceable claims. It finally sheds light on the road which the old concept of *ius* traveled in taking on the additional connotation of "legal order." Kaser himself stresses (p. 310) that all the formal acts of the early private law served to establish powers of individuals, entitling the holder to immediate seizure of the person or object acquired by him or producing ties which gave him the right to future seizure. It stands to reason that an increasing ability to comprise the different phenomena of legal life under one common theoretical category should find no difficulty in arriving at the new objective conception of *ius* as a system of powers (*Machtordnung*), if the concept of *ius* had always implied the idea of power.

The value of Kaser's book, which lies in its numerous special investigations, is not impaired, if the foregoing criticism is justified. Lack of space prevents the reviewer from entering upon a detailed discussion of these chapters. But he wishes to express his agreement with Kaser's defense, against Lévy-Bruhl,[11] of the interpretation of the *in iure cessio* as an uncontested *vindicatio* and with his explanation of the *addicere* of the praetor as the authoritative

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official to the judicial assembly; cf. *Traditio* IV 76f. Does the difference between *iudicare alicui maleficium* or *maleficii*, as said of the magistrate, and *iudicare aliquem* or *de aliquo ob maleficium*, or *iudicare* with *acc. c. inf.*, as said of the *comitia*, signify the different import of either *iudicare*? The magistrate states his own power to exact the penalty, while the *comitia* confirm this power; in other words, as one might perhaps interpret, closely following the wording of the Latin phrase: they pronounce the culprit into his *ius*.

[10] Kaser follows here W. Kunkel, *Festschrift Paul Koschaker* (Weimar 1939) II 1ff. The hypothesis is perhaps somewhat exaggerated; see, most recently, V. Arangio-Ruiz, *Il mandato in diritto romano* (Naples 1949) 45 n. 3; also A. Hägerström, *Z. Sav. St.* LXIII (1943) 271 (?).

[11] *Quelques problèmes du très ancien droit romain* (Paris 1934) 114ff.; more recently also *Deux études: addicere et auctoritas* (*Annales de l'Univ. de Lyon;* Paris 1942) 5ff. The latter article has apparently not come to the author's notice.

confirmation of the plaintiff's assertion of a *ius* (§ 14). It is perhaps a little too strong, however, when the author (p. 108) attributes to the *addicere* a " constitutive effect." [12] *Addicere*, in its original meaning, belongs in the same category with *iudicare* and, in the Greek sphere, *δικάζειν*,[13] and signifies the indispensable statement by which the magistrate responsible for peace and order in the dealings of the citizens with one another opens for the claimant the way to rightful seizure by selfhelp.[14, 15] Attention may further be called to the convincing interpretation (§ 15) of the formula *ita ius esto* (XII T. 5.3, 6.1) as a provision obviating the necessity of a judicial statement (as a condition of rightful seizure) of the right claimed; and to the connection, established by the author, between this and the rule *lis infitiando crescit in duplum*. To conclude this list, which could be much enlarged, the reviewer mentions the suggestive theory (§§ 28, 29) which derives the historical *sponsio* from a merger of two prehistoric acts, namely, a purely religious vow (the original *sponsio*) and a secular transaction (*stipulatio*) by which a person exposed himself to future seizure by another.

While the reviewer believes that in these matters, as well as in many others, the author's suggestions are acceptable or at least

[12] Similarly W. W. Buckland, *Festschr. P. Koschaker* (Weimar 1939) I 21, who refers to Varro, *De ling. lat.* 6.30. But Varro's words are fully compatible with the view expressed here.

[13] Cf. the inscription of Chios, fourth century B.C., last edited by K. Latte, *Z. Sav. St.* LIII (1933) 509f., a transfer of landed property effected in the forms of a judicial procedure (Kunkel, *ibid.* 512); line 24: *κατεδίκασεν*.

[14] Perfectly correct p. 351: " Erst die addictio macht die Selbsthilfe rechtmässig." This is the meaning of *addicere* wherever it occurs, see Kaser p. 182f., 214 and authors cited by him; for the case of the *fur manifestus* also E. Carrelli, *Annali della Fac. Giur. della R. Univ. di Bari* N.S. II (1939) 122. Lévy-Bruhl's attempt (*Quelques problèmes* 128) to distinguish between the various cases of *addictio* is arbitrary.

[15] If it is true that the absolute effect of the *in iure cessio* was a result of the fact that in old times the judicial sentence was effective for and against persons that were not parties to the lawsuit (Kaser p. 110f.), the reviewer would seek the reason for this rather in an after-effect of the awe in which the ordeal was held than in any constitutive force ascribed to the *addictio* as such. H. H. Pflüger, *Z. Sav. St.* LXIII (1943) 309, considers the absolute effect of the judgment in the *legis actio*, and therefore of the *in iure cessio*, as a consequence of the rule *ne bis sit actio* (Gai. 4.108). But perhaps Kaser (p. 115) is right in assuming a reverse order of cause and effect.

deserving of very serious consideration, there are others where one may doubt. To name one where the reviewer feels unable to follow the author: In § 34, Kaser, though avoiding the exaggerations of others,[16] tries to show the descent of some of the formal acts of the primitive law from old magic rituals by word and hand.[17] This may be correct for the *stipulatio*, if it is true—and it seems very probable—that at one time the surrender to future seizure was symbolized by the handing over of a token. But the reviewer doubts as to *vindicatio*,[18] *mancipatio*, and *nexum*. These, or at least the first two, are mere declarations before the magistrate or before witnesses that the object belongs to the declarant; the act of seizure connected with them is not symbolical but real, and the gods if called upon to render an ordeal will protect the truly declared right simply because the claim was true. It is difficult to see what purpose sorcery could serve here. If the author is right in asserting (p. 242) that the *nexi liberatio* by means of a *contrarius actus* belongs to an advanced stage of the legal evolution, this would also militate against his theory, because one should expect that magic ties could be dissolved only by opposite magic.

It would serve no useful purpose to continue this enumeration of assents and dissents. The reviewer's opinions may or may not be shared by others, but he hopes that his objective to give some impression of the character of Kaser's book and of the wealth of theories contained in it is fulfilled. It is one of the most penetrating treatises ever written on topics of the earliest Roman law. It can safely be expected that many of its solutions will find final acceptance, but also where this will not be the case its reasoning will prove suggestive and a challenge to further research. We express our admiration and gratitude for this stimulating contribution.

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[16] In particular, Hägerström, *Der röm. Obligationsbegriff im Lichte der allgemeinen röm. Rechtsanschauung* (Uppsala and Leipzig 1927, 1941); *Das magistratische ius in seinem Zusammenhang mit dem röm. Sakralrechte* (Uppsala 1929). For a criticism of these books see Kunkel, *Z. Sav. St.* XLIX (1929) 479ff.; B. Kübler, *Z. Sav. St.* LI (1931) 510ff.

[17] Cf. also Buckland, *op. cit.*

[18] See also Noailles, *Rev. Hist. de Dr. Fr. et Étr.* XIX (1941) 21f., 23ff.

Canon in den römischen Rechtsquellen und in den Papyri. Eine Wortstudie von Leopold Wenger. Akademie der Wissenschaften in Wien, Philosophisch-historische Klasse, Sitzungsberichte, 200. Band, 2. Abhandlung. Wien, 1942. 194 pp.

The author calls the extensive monograph under review a *Wortstudie*. Fortunately it does not belong to the group of those *Wortmonographien* which flourished during the twenties and thirties of our century and had as their sole purpose the elimination of some expressions from the treasury of the classical juristic language, by stigmatizing them as Byzantine and interpolated by Justinian's compilers wherever they occurred in his legislative work. The study of Professor Wenger, the venerable Austrian master of Roman law and ancient legal history, belongs to a class in itself and rests on more solid foundations than those "interpolationistic" monographs with their overdrawn generalizations.

The author gives a complete picture of the meanings of the term *canon*, based on a survey of the pertinent texts in the juristic sources, including Justinian's Novels, and in the Greek papyri. The start was not easy, since the term appears in later Roman sources, as is well known, in several, seemingly divergent meanings. On the one hand, *canon* is the rent paid annually by the emphyteuta (*canon emphyteuticus*) to the owner of the land, and besides, the land-tax paid to the state; on the other, it denotes a legal rule and is synonymous with the Latin *regula*. The first meaning (extended even to the payment of different kinds of duties) occurs more frequently in juristic texts and in the papyri from the fourth to the eighth century after Christ (with one exception belonging to the time of Hadrian), whereas the second prevails in Justinian's Novels. The characteristic features of the economic and financial *canon* are that its amount is fixed beforehand as a regular, annual payment which, on principle, is unchangeable. These features are the bridge which connects—as Wenger's convincing analysis from various points of view clearly shows—the two meanings of the term. Unknown in the writings of the classical jurists as well as in Justinian's Institutes and Digest, the word occurs frequently in the Theodosian and Justinian Codes. *Canon* as synonymous with *regula* shows the same traits as the various payments covered by the term: stability, regularity and fixedness, although moderation is not excluded. Thus Wenger's book offers two separate presentations, one, which explains

the economic and juristic contents of *canon* in its various applications in the Roman contractual and administrative [1] fields, and the other, by far more extensive, which outlines the development of the use of the terms *regula* and *norma* and their counterpart of Greek origin, *canon* (κανών). What Wenger has to say about *regula* (*regula iuris*) is a monograph in itself (pp. 47-71), rich in remarkable and original observations, particularly when he elaborates on the shift in the meaning of the term as used by the jurists, and later, in imperial constitutions, especially those of Justinian.[2]

Professor Wenger doubtless was right when, as a matter of principle, he refrained from defining his position regarding the assumption of interpolations in certain texts containing the term, *regula*. Such problems were not, strictly speaking, connected with his topic *regula—canon* (cf. p. 55 n. 1). But many a reader (and the present reviewer is one of them) would have welcomed a definite opinion on the author's part, even if it had been expressed without further argumentation in each specific case. His cautious reminders that in the critique of Digest texts he stands " auf der konservativeren Seite " [3] leaves the impression of a bashful concession to those who stand on the opposite side, as if their method of dealing with the sources were the better one. In this field in particular, Wenger's authority and experience, based on half a century of study of

[1] To the epigraphical material I should like to add the inscription CIL VI.1771 (*ex titulo canonico vinario*). Cf. *ibid.* 1784 and C. Theod. XIV.4.4.—Remarkable is the identification in the rubrics of two consecutive titles in C. Just. XI.23 and 24: *De canone frumentario urbis Romae,* and *De frumento urbis Constantinopolitanae.*

[2] I can hardly subscribe to the author's statement (p. 64) that the frequent reference to ancient legal rules (*regulae iuris antiqui*) belongs to that characteristic trend of his legislation which has been called *die archaistische Tendenz Justinians.* I do not see how this statement may be reconciled with the conclusions of Riccobono, " La verità sulle pretese tendenze arcaiche di Giustiniano," *Conf. Milanesi* (1931), e.g.: 'L'arcaico è nella struttura organica dei Digesti, ma esso è tutto esteriore e per nulla sostanziale " (p. 271), or: " In tutto il Corpus Iuris non si manifestano tendenze verso l'arcaico nel senso che oggi si assume " (p. 272).—Against the thesis of archaistic tendencies I took position (in regard to the allegedly interpolated citations of the Twelve Tables in the Digest) in *Studi Riccobono,* I (1936; reprints published in 1933), 585ff. and 640; cf. my earlier remarks in Pauly-Wissowa's RE_2 IV (1932), 1945, and in *Atti Congr. Intern. Dir. Rom.,* Roma I (1933) 41f.

[3] He uses the same phrase with reference to another problem, see p. 90.

Roman law, would surely carry considerable weight, even though in interpolationistic research there is no "Law of Citations." There are no conservative and progressive (or revolutionary, if some one prefers this term) methods in textual criticism and in search for interpolations. There are only right and wrong ones; hence, why not say whether they are right or wrong?

After demonstrating that *canon* and *regula* are synonyms in Justinian and contemporary sources, the author proceeds to an exhaustive study of *canon* and its derivatives (*canonicus*, κανονίζειν). A new application of the term *canon* appears side by side with the earlier one: *canones ecclesiastici*, which occurs only once in *Cod. Theod.* (also *regulae ecclesiasticae*, κανόνες ἐκκλησιαστικοί), is familiar to the language of the Novels. A neat distinction between *canones* in the sense of ecclesiastical principles, and νόμοι (secular laws) becomes predominant. This naturally required a penetrating inquiry into the attitude taken by Justinian towards the canons of the ecclesiastical law and into his policy with regard to the Church and its law. The problem of "Caesaropapism" is treated again and again in the second half of the book. The author cautiously refrains from taking a definite stand for or against Justinian's so-called Caesaropapism, but he is sufficiently familiar with the source material and the literature to point out what is needed for a precise formulation of the problem, which may lead to a definite solution. Church historians and scholars of ecclesiastical law will find in Wenger's book an exhaustive collection of the sources, which goes far beyond the modest subtitle, *eine Wortstudie*. Experts in the field will certainly appreciate the original approach of the prominent Roman law scholar to the problem. All the more will the average student of Roman law, less familiar with these questions, admire the courage with which this versatile scholar enters upon a new field.

Wenger's study ends with Justinian's Novels. It is not difficult to understand why the author limited his research to this period. He certainly was aware of the importance of further inquiry to cover the post-Justinian epoch and later centuries. But his scholarly conscience obliged him to limit himself to those sources for which the existing vocabularies and lexica—including the Index to Justinian's Novels which has been prepared at his initiative—gave the assurance that no text would be omitted. Copious material is to be

found in the earlier scholia to the Basilica, whose authors belong to the Emperor's contemporaries or survived him by a short time. There is no doubt that competent medievalists will continue spinning the thread where Wenger left it. A modest contribution will be offered by the present reviewer in an article concerned with an extremely rare term which he discovered in the scholia to the Basilica, προκανών.[4] Necessarily he had to look, at least superficially, for the meaning and derivations of κανών in those sources.[5] It was a happy coincidence that this writer received Wenger's monograph through the courtesy of the author just in time to be able to compare his own brief remarks with the results of Wenger's research. Therefore this review should not be concluded without the expression of the reviewer's personal gratitude to the author for the benefit he derived from the masterly study on *canon,* which may be recommended as a model of this kind of *Wortstudie.*

Wenger's book appeared during the war, several years ago, in the papers of the Academy of Sciences in Vienna, now officially called "Austrian Academy of Sciences." The book is still scarcely available in this country. Therefore a reference to a complete outline of its contents, written by the author himself, may be of use. The *Selbstanzeige* was published in *Zeitschrift der Savigny-Stiftung, Kanonistische Abteilung,* XXXII (1943), 495-506.[6]

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[4] To be published in the Festschrift in honor of Fritz Schulz. [For the medieval West, see also S. Kuttner, "Liber canonicus: A Note on Dictatus Papae c. 17," *Studi Gregoriani,* II (1947), 387ff. Ed.]

[5] The rubric of Dig. 50.17 (*De diversis regulis iuris antiqui*) is translated in Bas. II.3: περὶ διαφόρων κανόνων δικαίου ἀρχαίου.

[6] Professor A. Arthur Schiller has prepared a paper on "*Kanon* and *Kanonize* in Coptic texts." Of particular interest is the latter term, which occurs in a trial record, with a certain specific meaning. The article will appear in a volume of essays dedicated to the memory of W. E. Crum.

The Journal of Juristic Papyrology (cf. SEMINAR, IV [1946], 101f.) has been taken over by the Warsaw Society of Sciences and Letters. Vol. II (Warsaw, 1948; Polish title: *Rocznik Papirologii Prawniczej;* 119 pp.) consists of a juristic section, directed by Professor Raphael Taubenschlag, and a philological section, directed by Professor George Manteuffel. From vol. III on, the title will be changed into *Journal of Papyrology.*

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Academic Year 1948-1949

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Monthly Conferences:

October 21, 1948: Dr. Adolf Berger, Professor at the École Libre des Hautes Études, New York: "A Labor Contract of 164 A.D."

November 19, 1948: Dr. Roscoe J. C. Dorsey, former Professor of Roman Law and Jurisprudence at the Washington College of Law: "Roman and English Concepts in the Law of Obligations."

December 16, 1948: Dr. Stephan Kuttner: "Early English Canonists."

January 31, 1949: John W. Whelan, LL.B., Instructor of Law, Columbus University, Washington, D. C.: "The Controversy between Baron Ellesmere and Chief Justice Coke."

February 25, 1949: Dr. Vladimir Gsovski, Chief of the Foreign Section of the Law Library, Library of Congress; Head of the Russian Department, Georgetown University School of Foreign Service: "The Influence of Emphyteusis and Superficies on Soviet Law."

March 31, 1949: Dr. Heinrich Kronstein, Professor of Law, Georgetown University: "Conflicts in Conflicts of Law."

April 22, 1949: Dr. Franklin F. Russell: "Some Unusual Features of the Greek Civil Code of 1946."

May 19, 1949: Dr. Eberhard F. Bruck (Magisterial Address): "Political Ideology, Propaganda, and Public Law of the Romans: ius imaginum and consecratio imperatorum."

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Eberhard F. Bruck.

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